Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-11–02 OF 2014(W)
AHMAD MAAROP, JEFFREY TAN, ABU SAMAH AND AZAHAR MOHAMED FCJJ
6 OCTOBER 2015

Contract — Formation — Consensus ad idem — Whether subscription agreement that only executed by second respondent was concluded contract — Whether Court of Appeal erred in applying principle of informal contract to facts of present case — Whether issue of internal credit approval pre-requisite for execution of agreement — Whether consensus ad idem on terms alone enough to form binding contract — Whether presumption of intention to create legal relations had been rebutted by cl 7 of mandate letter — Whether correspondence between parties constituted consensus ad idem on terms

The appellant, a wholly-owned subsidiary of a German global banking entity, entered into a financial arrangement with MBF Holdings Bhd, an investment holding company in Malaysia ('the first respondent'), and MBF Cards (Malaysia) Sdn Bhd ('the second respondent'), which was credit and charge card company and a subsidiary of the first respondent. The terms of the financial arrangement were set out in a mandate letter, wherein the appellant accepted its appointment as lead arranger and lead manager to provide advisory services for financing secured on a portfolio of the credit card receivables of the second respondent. The mandate letter set out, inter alia, the nature of the advisory services to be provided by the appellant as lead arranger and lead manager to the respondents, stipulated the fees and expenses payable to the appellant for the advisory services it would provide to the respondents and also provided for the early termination or expiry of the appellant's appointment. In addition cl 7 of the mandate letter, which set out the conditions to the appellant's obligations, provided that if the appellant was to underwrite the notes or provide financing to the respondents, the terms and conditions of such transactions would be subject to separate agreements between the appellant and the respondents. After the mandate letter had been accepted by the first respondent, the parties entered into a series of negotiations that culminated in the preparation of a subscription agreement ('the SA') to be entered into between the appellant and the second respondent. Under the terms of the SA, the appellant was to provide the second respondent with bridge financing of up to RM600m with the establishment of an asset based securitisation structure ('ABS') secured on the second respondent's receivables. Pending the establishment of the ABS and before the finalisation of certain unresolved clauses in the SA, the second respondent executed the SA. However, the SA was

not executed by the appellant. Although the SA had not been executed by the appellant, the first respondent asserted that agreement had been reached between the appellant and the second respondent on the bridge financing. Thus the respondents pursued a civil claim against the respondents for general damages for breach of contract and misrepresentation and for special damages in the sum of RM1m. In its defence the appellant claimed that there was no concluded contract and that an internal credit approval had be obtained before the appellant could be bound by any funding arrangement. The High Court found that the appellant's internal approval was not in place at the material time and that the SA signed only by the second respondent did not constitute a concluded contract. As such, the High Court found in favour of the appellant. On appeal the Court of Appeal reversed the decision of the High Court and held that there was a consensus ad idem between the parties on the terms of the SA. The Court of Appeal found the SA to be a concluded contract with the subsequent requested variation to the SA by the appellant to be accommodated by way of a letter of variation. The Court of Appeal also categorised the appellant's defence as not different from that of a party who denied a concluded contract due to the contract being 'subject to contract' and also held that the negotiations in relation to the SA and the entering into the SA fell outside the scope of the mandate letter. As such, the Court of Appeal held that the appellant could not rely on cl 7 of the mandate letter as a basis to refuse to sign the SA or to deny the existence of a concluded contract. Consequently, the Court of Appeal allowed the respondents' appeal and remitted the respondents' claim to the registrar of the High Court for assessment of damages. The appellant had now applied for and obtained leave to appeal against the order of the Court of Appeal. In this appeal the appellant submitted that the Court of Appeal had erred in applying the principle of an informal contract that was not appropriate to find a multi-million funding contract to bind the appellant. It was also the appellant's contention that the issue of internal credit approval was always a pre-requisite for the execution of the SA and that the CA was wrong to hold that the internal credit approval was only a term of the mandate letter that lapsed when the SA came into being. The respondents submitted that the Court of Appeal was correct in its findings that the appellant could not rely on cl 7 of the mandate letter to justify its refusal to sign the SA or deny the existence of a concluded contract.

Held, allowing the appeal with costs:

(1) Although the SA which was only executed by the second respondent could be categorised as a complex and intricate agreement, this appeal involved a question of basic contract namely whether or not the parties were at ad idem. In addition, it is settled law that consensus ad idem on the terms alone was not enough to form a binding contract and that in order to be legally enforceable there should be the intention to create legal relations and consideration. However, both courts below had only

approached the core issue as to whether or not there had been a concluded agreement from only the aspect of consensus ad idem. To be fair, the High Court had not deliberated on the issue of intention to create legal relations, since it found that there was no consensus ad idem on the terms, to deliberate on the intention to create legal relations. However, there was no reason for the Court of Appeal not to proceed to deliberate on the intention to create legal relations, since it was its finding that there was consensus ad idem on the terms. To conclude that there was a concluded contract, merely on account of a finding of consensus ad idem on the terms, was a serious misdirection by the Court of Appeal (see para 48).

(2) In the present case, the presumption of intention to create legal relations could be rebutted by cl 7 of the mandate letter, which provided that there should be a separate agreement if the appellant was to underwrite the notes or provide financing. Even though the SA was that separate agreement as envisaged in the mandate letter, it did not follow that there was a binding contract because there were conditions to be fulfilled in cl 7 of the mandate letter before a separate agreement could bind the parties. If the mandate letter was read as a whole, which the Court of Appeal failed to do, it would be clear that the letter was a composite of bargains. It was clear and unambiguous that the mandate letter could not give rise to any obligation on the part of the appellant to provide financing. In order for that commitment by the appellant, cl 7 of the mandate letter had to be satisfied. Clause 7 of the mandate letter that was an integral and inseparable part of the mandate letter provided the eight conditions contained therein should all be fulfilled before a separate agreement could bind the appellant. The two relevant conditions for this appeal were firstly the condition in cl 7(g) that required the appellant to have obtained internal credit approval and secondly the condition in cl 7(h) the completion and execution of mutually satisfactory documentation (see paras 49–50).

(3) The Court of Appeal had erred in picking out isolated bits of the emails between the parties to find consensus ad idem on the terms. Based on the entire set of emails/correspondence, it was so evident that there was no consensus ad idem on the terms and that condition (g) of cl 7, which was always at the forefront of negotiations, was not satisfied. The parties had in fact conducted themselves in sure knowledge that condition (g) of cl 7 had not been fulfilled and there was no binding contract. Needless to say that without the appellant's execution of the SA, condition (h) of cl 7 was also not satisfied. The formality of an executed agreement was by choice and the court should give effect to that intention and not foist an informal contract, which was not the practice of financial institutions. Unless required by law, there was no rule that a complex and intricate

bargain could be concluded by an informal contract. As such, there was no concluded contract in the instant case (see paras 73 & 80).

[Bahasa Malaysia summary

Perayu, subsidiari milik penuh entiti perbankan global Jerman, telah memasuki aturan kewangan dengan MBf Holdings Bhd, satu syarikat pegangan pelaburan di Malaysia ('responden pertama'), dan MBf Cards (M) Sdn Bhd ('responden kedua'), yang merupakan syarikat kad kredit dan caj dan subsidiari responden pertama. Terma-terma aturan kewangan telah dinyatakan dalam surat mandat, yang mana perayu menerima pelantikannya sebagai ketua pengatur dan ketua pengurus bagi memberikan khidmat nasihat untuk pembiayaan kewangan yang dijamin atas portfolio kad kredit yang boleh diterima responden kedua. Surat mandat itu menyatakan, antara lain, sifat khidmat nasihat yang diberikan oleh perayu sebagai ketua pengatur dan ketua pengurus kepada responden-responden, menetapkan fi dan perbelanjaan yang kena dibayar kepada perayu untuk khidmat nasihat yang diberikannya kepada responden-responden dan juga memberi penamatan atau peluputan awal pelantikan perayu. Selain fasal 7 kepada surat mandat itu, yang menyatakan syarat-syarat kepada obligasi perayu, memperuntukkan bahawa jika perayu menaja jamin nota-nota itu atau memberikan pembiayaan kewangan kepada responden-responden, terma dan syarat transaksi sedemikian adalah tertakluk kepada perjanjian berasingan antara perayu dan responden-responden. Selepas surat mandat itu diterima oleh responden pertama, pihak-pihak memasuki beberapa siri rundingan yang berakhir dengan persediaan perjanjian subskripsi ('PS') yang dimasuki antara perayu dan responden kedua. Di bawah terma-terma PS itu, perayu perlu memberikan kepada responden kedua pembiayaan perantara sehingga RM600 juta dengan pewujudan aset berdasarkan struktur keselamatan ('ASK') yang dijamin dengan penerimaan responden kedua. Sementara menunggu pewujudan ASK dan sebelum penyelesaian fasal-fasal tertentu yang belum sempurna dalam PS itu, responden kedua telah melaksanakan PS itu. Walau bagaimanapun, PS itu tidak dilaksanakan oleh perayu. Meskipun PS itu tidak dilaksanakan oleh perayu, responden pertama menegaskan bahawa persetujuan telah tercapai antara perayu dan responden kedua berhubung pembiayaan perantara itu. Oleh itu responden-responden telah memulakan tuntutan sivil terhadap responden untuk ganti rugi am kerana pelanggaran kontrak dan salah nyata dan untuk ganti rugi khas berjumlah RM1 juta. Dalam pembelaannya perayu mendakwa bahawa tidak ada kontrak yang disempurnakan dan bahawa kelulusan kredit dalaman perlu diperoleh sebelum perayu boleh terikat dengan apa-apa aturan pembiayaan wang. Mahkamah Tinggi mendapati kelulusan dalaman perayu tidak berlaku pada masa matan dan bahawa PS itu hanya ditandatangani oleh responden kedua tidak menjadi satu kontrak yang disempurnakan. Oleh itu, Mahkamah Tinggi mendapati berpihak kepada perayu. Atas rayuan, Mahkamah Rayuan telah mengakas keputusan Mahkamah Tinggi dan memutuskan bahawa terdapat *consensus ad idem* antara

pihak-pihak berdasarkan terma-terma PS itu. Mahkamah Rayuan mendapati PS itu satu kontrak yang disempurnakan dengan pengubahan yang diminta berikutnya kepada PS itu oleh perayu untuk penyesuaian melalui surat pengubahan. Mahkamah Rayuan juga mengkategorikan pembelaan perayu tidak berbeza daripada satu pihak yang menafikan kontrak yang disempurnakan akibat daripada kontrak itu 'subject to contract' dan juga memutuskan bahawa rundingan berkaitan PS itu dan memasuki PS itu terjatuh di luar skop surat mandat itu. Oleh itu, Mahkamah Rayuan memutuskan bahawa perayu tidak boleh bergantung kepada fasal 7 surat mandat itu sebagai asas untuk enggan menandatangani PS itu atau menafikan kewujudan kontrak yang telah disempurnakan. Berikutan itu, Mahkamah Rayuan telah membenarkan rayuan responden-responden dan meremitkan tuntutan respodnen-responden kepada pendaftar Mahkamah Tinggi untuk penaksiran ganti rugi. Perayu kini memohon untuk dan memperoleh kebenaran untuk merayu terhadap perintah Mahkamah Rayuan. Dalam rayuan ini perayu berhujah bahawa Mahkamah Rayuan terkhilaf dalam mengguna pakai prinsip kontrak tidak rasmi yang tidak sesuai untuk mencari kontrak pembiayaan berjuta untuk mengikat perayu. Ia juga adalah hujah perayu bahawa isu kelulusan kredit dalaman sentiasa merupakan prasyarat untuk pelaksanaan PS dan bahawa Mahkamah Rayuan terkhilaf dalam memutuskan bahawa kelulusan kredit dalaman hanya terma dalam surat mandat itu yang telah luput apabila PS itu berkuat kuasa. Responden-responden berhujah bahawa Mahkamah Rayuan adalah betul dalam penemuannya bahawa perayu tidak boleh bergantung kepada fasal 7 surat mandat itu bagi mewajarkan keengganannya menandatangani PS itu atau menafikan kewujudan kontrak yang telah disempurnakan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Walaupun PS itu yang hanya disempurnakan oleh responden kedua boleh dikategorikan sebagai perjanjian yang kompleks dan teliti, rayuan ini melibatkan persoalan kontrak asas iaitu sama ada atau tidak pihak-pihak adalah *ad idem*. Selain itu, ia adalah undang-undang tetap bahawa *consensus ad idem* berhubung terma-terma itu sendiri tidak mencukupi untuk membentuk kontrak yang mengikat dan bagi tujuan ia boleh dikuatkuasakan secara sah perlu ada niat untuk mewujudkan hubungan dan balasan sah. Walau bagaimanapun, kedua-dua mahkamah bawahan hanya menangani isu utama berhubung sama ada atau tidak terdapat perjanjian yang telah disempurnakan hanya dari aspek *consensus ad idem*. Untuk berlaku adil, Mahkamah Tinggi tidak membincangkan isu tentang niat untuk mewujudkan hubungan sah, oleh kerana ia mendapati bahawa tidak ada *consensus ad idem* berdasarkan terma-terma, untuk membincangkan tentang niat untuk mewujudkan hubungan sah. Walau bagaimanapun, tiada sebab untuk Mahkamah Rayuan tidak memulakan niat untuk membincangkan bagi mewujudkan hubungan

sah, kerana penemuannya bahawa terdapat *consensus ad idem* pada terma-terma itu. Untuk membuat kesimpulan bahawa terdapat kontrak yang telah disempurnakan, hanya dengan penemuan *consensus ad idem* berdasarkan terma-terma itu, adalah satu salah arah yang serius oleh Mahkamah Rayuan (lihat perenggan 48).

(2) Dalam kes ini, andaian suatu niat untuk mewujudkan hubungan sah boleh dipatahkan oleh fasal 7 kepada surat mandat itu, yang memperuntukkan bahawa perlu ada perjanjian berasingan jika perayu ingin menaja jamin nota-nota atau memberikan pembiayaan. Walaupun PS itu adalah bahawa perjanjian berasingan sebagaimana termaktub dalam surat mandat itu, ia tidak diikuti bahawa terdapat kontrak yang mengikat kerana terdapat syarat-syarat untuk dipenuhi dalam fasal 7 kepada surat mandat itu sebelum perjanjian berasingan boleh mengikat pihak-pihak. Jika surat mandat itu dibaca secara keseluruhan, yang mana Mahkamah Rayuan gagal berbuat demikian, ia jelas bahawa surat itu mengandungi tawaran. Ia jelas dan taksa bahawa surat mandat itu tidak boleh menimbulkan apa-apa kewajipan di pihak perayu untuk memberikan pembiayaan kewangan. Bagi tujuan komitmen itu oleh perayu, fasal 7 kepada surat mandat itu perlu dipenuhi. Fasal 7 kepada surat mandat itu yang merupakan bahagian penting tidak boleh dipisahkan dengan surat mandat itu memperuntukkan lapan syarat yang terkandung dalamnya patut dipenuhi sebelum perjanjian berasingan boleh mengikat perayu. Dua syarat berkaitan untuk rayuan ini adalah pertama syarat dalam fasal 7(g) yang menghendaki perayu memperoleh kelulusan kredit dalaman dan kedua syarat dalam fasal 7(h) mengenai pendokumentasian yang telah siap dan dilaksanakan bersama dengan memuaskan (lihat perenggan 49–50).

(3) Mahkamah Rayuan terkhilaf dalam mengambil cebisan berasingan emel-emel antara pihak-pihak untuk mendapat *consensus ad idem* berhubung terma-terma itu. Berdasarkan keseluruhan set emel/perhubungan, ia jelas bahawa tiada *consensus ad idem* berhubung terma-terma itu dan syarat (g) fasal 7, yang sentiasa diutarakan dalam rundingan, tidak dipenuhi. Pihak-pihak telah pada hakikatnya bertindak dengan pengetahuan bahawa syarat (g) fasal 7 tidak dipenuhi dan tiada kontrak yang mengikat. Oleh itu tanpa pelaksanaan perayu terhadap PS itu, syarat (h) fasal 7 juga tidak dipenuhi. Sifat formal perjanjian yang dilaksanakan adalah berdasarkan pilihan dan mahkamah hendaklah memberi kesan kepada niat itu dan tidak menipu suatu kontrak yang tidak rasmi, yang bukan amalan institusi kewangan. Kecuali dikehendaki undang-undang, tiada peraturan bahawa tawaran yang kompleks dan teliti boleh dimuktamadkan melalui kontrak tidak rasmi. Oleh itu tiada kontrak yang telah disempurnakan dalam kes ini (lihat perenggan 73 & 80).]

Notes

For cases on formation of contract in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 5023–5202.

Cases referred to

Ahmad Zaini bin Japar v TL Offshore Sdn Bhd [2002] 7 MLJ 604, HC (refd)
Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd (1985) 2 NSWLR 309, CA (refd)
Anuiti Enterprise (M) Sdn Bhd v Cubic Electronics Sdn Bhd [2006] 6 MLJ 565, HC (refd)
Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)
Baillie Estates Ltd v Du Pont (UK) Ltd [2009] CSOH 95 (refd)
Barclays Bank plc v O'Brien [1994] 1 AC 180, HL (refd)
Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd (1986) 40 NSWLR 622, SC (refd)
Beesly v Hallwood Estates Ltd [1960] 1 WLR 549, Ch D (refd)
Birse Construction Ltd v St David Ltd (2000) 78 ConLR 121 (refd)
Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd [1979] 1 WLR 401, CA (refd)
Carlyle v Royal Bank of Scotland [2015] UKSC 13, SC (refd)
Carruthers v Whitaker [1975] 2 NZLR 667, CA (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783; [2009] 6 CLJ 501, FC (refd)
Cheverny Consulting Ltd v Whitehead Mann Ltd [2007] 1 All ER (Comm) 124, CA (refd)
Clifton v Palumbo [1944] 2 All ER 497, CA (refd)
Cohen v Nessdale Ltd [1982] 2 All ER 97, CA (refd)
Concorde Enterprises Ltd v Anthony Motors Ltd [1981] 2 NZLR 385, CA (refd)
Cornish v Midland Bank plc; (Humes, third party) [1985] 3 All ER 513, CA (refd)
Daiman Development Sdn Bhd v Matthew Lui Chin Teck & Anor Appeal [1981] 1 MLJ 56, PC (refd)
Datuk M Kayveas & Anor v Bar Council [2013] 5 MLJ 640, FC (refd)
Diamond Peak Sdn Bhd & Anor v Dr Tweedie [1982] 1 MLJ 97 (refd)
Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd [2002] 2 NZLR 433, CA (refd)
GYC Financial Planning Pte Ltd and Another v Prudential Assurance Company Singapore (PTE) Ltd [2006] 2 SLR 865, HC (refd)
Haq v Island Homes Housing Association and anor [2011] EWCA Civ 805, CA (refd)
Ho Kam Phaw v Fam Sin Nin [2000] 2 MLJ 529; [2000] 3 CLJ 1, FC (refd)
Hui Jia Hao v Perdana Park City Sdn Bhd & Anor [2012] 8 MLJ 385, HC (refd)

A *Immingham Storage v Clear Plc* [2011] EWCA Civ 89, CA (refd)
John R Keith Ltd v Multiplex Constructions (NSW) Pty Ltd [2002] NSWSC 43, SC (refd)
Johnson v Agnew [1979] 2 WLR 487, HL (refd)
Jone Theseira v Eileen Tan Ee Lian & Anor [2002] 4 MLJ 629, HC (refd)
B *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108, SC (refd)
Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang [2006] 4 MLJ 656, CA (refd)
Koh Peng Moh v Tan Chwee Boon [1962] 1 MLJ 353 (refd)
Lee Chin Kok v Jasmin Arunthuthu Allegakoen & Ors [2000] 4 MLJ 481;
C [2000] 4 CLJ 305, SC (refd)
Lim Keng Siong & Anor v Yeoh Ah Tee [1983] 2 MLJ 39, FC (refd)
Love and Stewart Ltd v S Instone & Co Ltd (1917) 33 TLR 475, HL (refd)
Low Kar Yit & ors v Mohamed Isa & Anor [1963] 1 MLJ 165 (refd)
Masters v Cameron (1954) 91 CLR 353, HC (refd)
D *MBF Holdings Bhd & Anor v Deutsche Bank (Malaysia) Bhd & Anor* [2012] MLJU 560; [2012] 8 CLJ 477, HC (refd)
Moria & Anor v Bednash [2011] EWHC 839 (Ch), Ch D (refd)
New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon) [1975] AC 154, PC (refd)
E *OCBC Capital Investment Asia Ltd v Wong Hua Choo* [2012] SGCA 54, CA (refd)
Oceanografia SA de CV v DSND Subsea AS [2006] EWHC 1360 (Comm), QBD (refd)
Ong Chong Soo v Tan Eng Tai & Anor [1982] 1 MLJ 307 (refd)
F *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854, HL (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)
Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601, CA (refd)
G *Petromec Inc and others v Petroleo Brasileiro SA Petrobas and others* [2005] EWCA Civ 891, CA (refd)
R & J Dempster v Motherwell Bridge & Engineering Co 1964 SC 308 (refd)
RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14, SC (refd)
H *Rossiter v Miller* (1878) 3 App Cas 1124, HL (refd)
Royal Bank of Scotland Plc v William Derek Carlyle [2014] SCLR 167 (refd)
Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42, CA (refd)
Sinclair Scott & Co Ltd v Naughton (1929) 43 CLR 310, HC (refd)
Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & Ors [1992] 3 CLJ
I Rep 611, HC (refd)
Stobo Ltd v Morrisons (Gowns) Ltd 1949 SC 184 (refd)
Tai Tong Realty Co (Pte) Ltd v Galstaun & Anor [1973] 2 MLJ 95, CA (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)

Taylor v Burton and another [2015] EWCA Civ 142, CA (refd)
Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd's Rep 209, HL (refd)
Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141, FC (refd)
Whittle Movers Ltd v Hollywood Express Ltd [2009] EWCA Civ 1189, CA (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 65, 67
Contracts Act 1950 s 74
Courts of Judicature Act 1964 s 78
Specific Relief Act 1950 s 18

Cyrus Dass (Logan Sabapathy with him) (Logan Sabapathy & Co) for the appellant.
Tommy Thomas (A Vasanthi with him) (Vas & Co) for the respondents.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] Leave was granted to the appellant/defendant ('Deutsche') to appeal against the order of the Court of Appeal in respect of the matter decided by the High Court in the exercise of its original jurisdiction, on the following nine 'questions of law':

> 1.1 Whether the principle of law on concluded contracts (generally applied in relation to sale and purchase of property) are applicable in the same manner to financial transactions involving funding by banks or a syndicate of banks.
>
> 1.2 Whether the principle in contract law of an enforceable informal contract applies to financing or funding transactions of a complex nature involving banks who are subject to internal credit approval conditions, guidelines and/or limitations.
>
> 1.3 Whether it is implicit in every financing transaction involving banks in Malaysia that internal credit approval guidelines as required by the regulating central bank, namely, Bank Negara Malaysia, would automatically apply to the proposed transaction.
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> 1.4 In a setting where documentation (particularly relating to complex financial or funding transactions) is being carried out with the involvement of separately appointed solicitors, whether the principles of 'locus poenitentiae' (as applied in other Commonwealth jurisdictions) ought to be considered, namely, that neither party to any apparently alleged concluded contract is bound until and unless such documentation is formally signed-off by both parties.

1.5 Whether funding transactions by banks involving as in this case financing products called medium term notes and asset securitization programme would fall within the classes of contracts governed by the locus poenitentiae principle, namely, the right to withdraw from the transaction until there exists a formally signed-off contractual commitment document.

1.6 In a case where there exists a collateral condition to the existence of an allegedly concluded contract (for example internal credit approval), whether the onus of proving the fulfilment of such condition lies with the party asserting the fulfilment of the condition.

1.7 Can a party choose to subsequently abandon the originally pleaded claim for specific performance (given the separate legal implications of s 74 of the Contracts Act 1950 and s 18 of the Specific Relief Act 1950) and thereby avoid addressing whether the alleged contract (example, a contract to lend money) was in the first place sustainable in law for specific performance.

1.8 Whether a party's claim for damages in lieu of specific performance is maintainable as contended by the plaintiff in this case, when in the first place there could be no decree for specific performance of an alleged contract for bank financing of funding or project financing in general.

1.9 Is an appellate court entitled to direct a re-hearing of the assessment of damages without first determining if the lower court's determination on the assessment of damages was erroneous.

[2] The background facts could be summarised as follows. Deutsche is a wholly-owned subsidiary of Deutsche Bank Aktiengesellschaft, a German global banking and financial services giant with its headquarters in Frankfurt, Germany. The first respondent is an investment holding company listed on the Bursa Malaysia. At the material time, the second respondent, a credit and charge card company in Malaysia, was a subsidiary of the first respondent. In August 2007, the respondents ('MBf') sought underwriters for its commercial papers and medium term notes ('notes') that made up its credit card funding programme, and bridge financing, pending the establishment of an asset based securitisation structure ('ABS') secured on the second respondent's receivables. The first respondent appointed Deutsche as its exclusive lead arranger and lead manager to provide advisory services for financing secured on a portfolio of credit card receivables of the second respondent. By letter dated 8 October 2007 (which the parties referred to as the mandate letter), Deutsche accepted that appointment and spelt out the services to be provided by Deutsche, the fees and expenses payable by the first respondent for the advisory services, and the preconditions for termination and or expiry of the appointment of Deutsche. Those latter provisions are not significant to this appeal. But of the essence is cl 7 of the mandate letter, which reads:

7. Conditions to Deutsche's Obligations

Client hereby acknowledges that were Deutsche Bank to underwrite the Notes or provide financing to Client or any other person or entity, the terms and conditions of such transactions would be subject to separate agreements between client, Deutsche Bank and/or such other person or entity. Nothing in this agreement shall be construed as an obligation on the part of Deutsche Bank or any member of the Deutsche Bank Group to enter into any swap transaction with or to provide any financing to client or any other person or entity or to underwrite the Notes.

Deutsche Bank's obligations hereunder, are expressly subject to the satisfaction of the following conditions:

(a) All requisite governmental and corporate approvals have been obtained by Client;

(b) Mutual agreement of the final terms of the Transaction, including, without limitation, the coupon, issue price, launch and closing date for the Notes;

(c) The successful completion of due diligence satisfactory to Deutsche Bank and other supporting profession as required by an government agency or exchanges in all respects;

(d) Receipt by Deutsche Bank, in form and substance satisfactory to Deutsche Bank, of closing documents it may require in connection with offering of the Notes, which closing documents may include, without limitation, (i) opinions from legal counsel (to be dated the closing date) and (ii) comfort letters and reports from the independent auditors of Client (to be dated the signing date and the closing date);

(e) In the opinion of Deutsche Bank, since the date of this Agreement, there being no occurrence of any material adverse change in (i) the international/domestic financial, banking or capital markets in general; (ii) the economic, political or financial condition in the jurisdictions where the Client and its affiliates are each incorporated; (iii) the business conditions (financial or other), regulatory environment or prospects of Client or its affiliates; (iv) monetary policies or tax or other laws or regulations; (v) the international/domestic political environment (including without limitation, any outbreak of hostilities);

(f) The Notes being rated by the Rating Agency with an underlying structural rating of investment grade of at least AA for a substantial majority of the Notes;

(g) All necessary internal approvals have been obtained by Deutsche Bank; and

(h) The completion and execution of mutually satisfactory documentation, and the satisfaction of conditions contained therein.

Deutsche Bank may terminate this Agreement, without liability, by written notice to Client if any of the foregoing conditions are not satisfied.

[3] After the mandate letter had been accepted by the first respondent, there ensued, between the latter half of October 2007 to beginning of November 2007, a frenetic exchange of emails/letters between the parties/solicitors, and or internal emails, which led to the preparation of a subscription agreement ('SA') to be entered into between Deutsche of the one part and the second respondent of the other part. Three drafts of the SA which provided that Deutsche would provide the second respondent with bridge financing of up to RM600m, pending the establishment of the said ABS, were prepared and exchanged for approval. 'Variations' were sought. While that were yet unresolved, the second respondent executed the SA on 2 November 2007. But the SA was not executed by Deutsche.

[4] Although the SA was not executed by Deutsche, MBf asserted that agreement had been reached between Deutsche and the second respondent on the aforesaid bridge financing. MBf pursued an action for general damages for breach of contract and misrepresentation, and for special damages in the sum of RM1m. Deutsche's defence was that its internal credit approval had not been obtained and that there was no concluded contract.

[5] The core issue, according to the trial court, was whether the SA, which was only signed by the second respondent, constituted a concluded contract. The trial court held that internal approval was not in place at the material time (see para 8 of the judgment of the trial court which was reported in [2012] MLJU 560 ; [2012] 8 CLJ 477). And guided by the dicta in *Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & ors* [1992] 3 CLJ Rep 611 , *Ho Kam Phaw v Fam Sin Nin* [2000] 2 MLJ 529; [2000] 3 CLJ 1, *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209, the trial court held that the SA was 'not a contract as both parties had not signed it' (see para 11(b) of the judgment of the trial court).

[6] The Court of Appeal saw it differently (the judgment of the Court of Appeal was not reported). According to the Court of Appeal, the issues were (i) whether a separate agreement as envisaged in cl 7 of the mandate letter had come into being in the form of the SA, and if so, then whether the SA was a concluded contract, (ii) whether it was open to Deutsche to rely on 'the causes' in cl 7 of the mandate letter to refuse to sign the SA by reason of the absence of internal credit approval, and, (iii) whether the request by Deutsche for an amendment to the SA meant that the SA was not a concluded contract.

[7] On the aforesaid issue (i), the Court of Appeal purportedly applied the principles stated in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, *Lee Chin Kok v Jasmin Arunthuthu Allegakoen & Ors* [2000] 4 MLJ 481; [2000] 4 CLJ 305, and *OCBC Capital Investment Asia Ltd v Wong Hua Choo* [2012] SGCA 54, and held that an enforceable SA came into existence on

2 November 2007 by reason of the following factors: the SA was the separate agreement envisaged in cl 7 of the mandate letter; two drafts of the SA prepared primarily by Deutsche's solicitors had been forwarded to MBf for approval; after those two drafts had been approved by MBf, Deutsche's solicitors forwarded a third draft of the SA via with the following email dated 2 November 2007 at 6.58pm:

> Dear all, please find attached a third draft of the subscription agreement. Would all parties revert with their confirmations whether they have any further comments so that we may proceed to finalise the document.

[8] The Court of Appeal read the aforesaid email dated 2 November 2007 to mean that there was consensus on all the terms and conditions in the SA.

> A reasonable interpretation of the contents of this email would be that the management of the respondents had no further outstanding issues on the subscription Agreement. That there was consensus between the parties on all the terms and conditions included in the subscription agreement when executed by the appellants' representative, is evident from the contents of the following two emails:
>
> (i) From the solicitors for (MBf);
>
> > Our clients have informed us that as agreed between our clients and you, we will fair the copy on our end, save for the information relating to Deutsche Bank which you will complete on your end and obtain Tan Sri's signature on the aforesaid basis by this evening.
>
> (i) The solicitors for (Deutsche Bank);
>
> > Dear Soo Ching as instructed by DB, please find attached a clean and marked up copy.

[9] As for the 'variations' sought by Deutsche, the Court of Appeal held that the aforesaid email was 'consistent with (Deutsche) acknowledging the subscription agreement to be a concluded contract and for the variation to be accommodated by way of a letter of variation', which finding of a concluded contract and a letter of variation ('LV') to accommodate the variations, was further supported, according to the Court of Appeal, by the following email dated 6 November 2007 that was transmitted by Deutsche's solicitors at 21:31 to MBf:

> Hi Ada,
>
> Spoke to Raja Ali, and I was made to understand that DB Malaysia hopes to sign the proposed subscription agreement and the letter of variation to the terms thereof earliest this Wednesday latest this Friday.
>
> Thank and best regards
>
> Pui Wei.

[10] The contents of the aforesaid email dated 6 November 2007 was the subject of intense cross-examination, of Yong Pui Wei (DW3) who was hounded to agree that the appellant was ready to execute the SA:

> RSK: I would be correct in saying that Raja Ali, on behalf Deutsche Bank have instructed you to prepare the agreement, the Subscription Agreement and the letter of variation to be signed earliest by Wednesday or latest by Friday. They were prepared to sign it.
>
> Yong: All Raja Ali told me was that it is actually he is hoping to sign the documents within the given time frame as set out in the email but it is not as though he is saying he is confirming that all issues have been sorted out.
>
> RSK: All that point in time, were you told that there was no internal credit approval was obtained and they were not ready to sign. Were you privy to that information?
>
> Yong: I mean, Ada's email (00:17:09) of the 2nd November.
>
> RSK: No, I am talking about that email that I am referring you to.
>
> Yong: Well, as far as I can remember, there was no change in the status quo as per what Ada mentioned on the 2nd November which was that, that was still internal issues that were outstanding.
>
> RSK: Right, but they were ready to sign? Would I be correct in signing, saying? I am just basing it on your email on.
>
> Yong: That's not what my email meant to say that it was ready to sign. What the email was saying is that they are hoping to sign within that time frame. I didn't get an instructions that they conclusively they will sign within that time.

[11] The Court of Appeal held that the aforesaid answers of DW3 further supported the finding that '(Deutsche) treated the SA as a concluded contract':

> In our judgment, these answers of DW3 clearly reflect that as far as Raja Ali was concerned, (Deutsche) treated the subscription agreement as a concluded contract and that agreement had been reached between the parties for the subsequently requested variation to be accommodated by way of a letter of variation. The reference in the answers of DW3 to Ada's email is irrelevant since it is not in dispute that the contents of this email were never communicated to (MBf).

[12] Two further grounds given by the Court of Appeal to support its finding that the SA was a concluded agreement, were:

> Fourthly, an important consideration when evaluating the aforesaid answers of DW3 is the evidence of Raja Ali that he was notified of the absence of credit approval on 7th November 2007 (see page 597 of Jilid 8/25). In our judgment, in the face of the evidence of DW3 that her notification to the appellants that the respondents were prepared to sign 'earliest by Wednesday or latest by Friday' vide her email of 6th November 2007 was pursuant to the express instruction of Raja Ali,

then, it stands to reason that Raja Ali would be most anxious to retract this instruction to his solicitors and inform the appellants forthwith of the change in circumstances since the position now was that the respondents were not planning to sign the subscription agreement at all. Yet, no evidence was led through DW3 that Raja Ali had required her to inform the appellants to withdraw the contents of the email of 6th November 2007. More importantly, Raja Ali conceded under cross-examination that he had not acted on the information purportedly received by him on the 7th at all until the respondents' letter of 12th November 2007. We use the word 'purportedly' because Barry in his email of 9th November 2007 requesting his officers to 'hold off' executing the Subscription Agreement mentions 'additional comments' as the reason and not lack of internal approval. With respect, surely if internal approval was rejected by the management on 7th November 2007 as claimed by Raja Ali, then, Barry with prior knowledge of the absence of internal approval would have made mention of this fact as opposed to proposing amendments to the agreement, and

Finally, the letter from the respondents dated 12th November 2007 seeking to withdraw from the subscription agreement makes no mention whatsoever of the respondents having notified the appellants prior 2nd November 2007 of the need for the and absence of internal approval. With respect, in our judgment, if either Raja Ali or Barry had notified the appellants' representative of the absence of credit approval orally, as claimed by them, it stands to reason that reference would have been made in the respondents' letter of 12th November 2007 to the earlier oral notification of the need for and absence of internal approval. The only explanation proffered by Raja Ali for this absence was 'oversight I guess' (see page 579 of Jilid 8/25). With respect, this is not a reasonable explanation bearing in mind the size of the transaction, the urgency with which the completion of legal documentation had been pursued by both parties and the name and fame of the respondents. Accordingly, in our judgment, a reasonable inference would be that the respondents had not notified the appellants prior 12th November 2007 that the subscription agreement was subject to their obtaining internal approval and that such approval was not in place at the time of the execution of the subscription agreement by the appellants.

[13] On the aforesaid issue (ii), the Court of Appeal categorised the defence as 'not different from that of a party who denies a concluded contract due to the contract being 'subject to contract' and no contract having been signed' and held that 'the negotiations in relation to the subscription agreement and the entering into of the subscription agreement fall outside the scope of the mandate letter'. The Court of Appeal further reasoned as follows. Given the opening words of cl 7 of the mandate letter — 'Client hereby acknowledges that were Deutsche Bank to underwrite the notes or provide financing to client or any other person or entity' — '(Deutsche) was under no obligation to underwrite the Notes or provide finance under the mandate letter'. Since there was no obligation on the part of (Deutsche) to underwrite the notes, 'the various conditions including those in cl 7(g) which fall under the term 'hereunder' are not applicable to the subscription agreement'. 'In our judgment, once (Deutsche) resolved to enter into the transaction to provide

finance by way of the subscription agreement, the legal rights of the parties are governed by the subscription agreement ... once it is accepted that the subscription agreement is the separate agreement ... it follows that (Deutsche) cannot rely on the conditions or 'causes' in cl 7 as a basis to refuse to sign the subscription agreement or to deny the existence of a concluded contract'. ' ... we agree ... that upon (Deutsche) appointing solicitors to finalise the terms and conditions of the separate agreement pursuant to (Deutsche)'s decision to provide financing, the rights of the parties ought to be determined in law based on the terms and conditions of the separate agreement and not the 'causes' in the mandate letter'. ' ... it was open to (Deutsche) to incorporate conditions similar to the 'causes' in cl 7 of the mandate letter if its intention was to reserve the rights to 'walk away' from the subscription agreement in the form of conditions precedent and or conditions subsequent'. ' ... once the subscription agreement had become an enforceable contract, as is our finding on the facts of this case, it was no longer open to (Deutsche) to refuse to sign the subscription agreement'. ' ... the fact that (Deutsche) had not signed the subscription agreement is not relevant since if the agreement was a concluded contract, then (Deutsche) was obliged to sign the same, if need be by an order of specific performance'. ' ... by appointing lawyers to complete the legal documentation and by authorising them to allow the (first respondent) to sign the fair copy of the subscription agreement without making known any impediment on their part to the completion of the agreement', Deutsche was 'clearly estopped in law from contending that there was no internal approval to complete the transaction' (see paras 20–22 of the judgment of the Court of Appeal).

[14] And in relation to the aforesaid issue (iii), which the Court of Appeal, really, could only answer in tandem with its answer to the aforesaid issue (i), the Court of Appeal held that the variations sought by Deutsche 'did not affect the status of the subscription agreement as a concluded contract for the following reasons'. The Court of Appeal also said the following. By its email dated 6 November 2007 at 8.37am, Deutsche did not seriously object to the amendment. Further to the receipt of MBf's comments on the LV by solicitors for Deutsche at 2.30pm, it was not communicated to MBf that the same was not acceptable to Deutsche. On 6 November 2007 at 9.31pm, by an internal email, Deutsche's solicitors indicated that they understood from Raja Ali that Deutsche proposed to sign the SA and LV 'earliest this Wednesday and latest this Friday'. 'Since that email (at 9.31pm) was subsequent to the email from MBf to Deutsche, it was reasonable to conclude that Raja Ali was prepared to accommodate the comments of MBf on the amendment'. ' ... in any event, the subscription agreement in cl 15 provided for the contingency of amendment made to the subscription agreement. The amendments were to be evidenced, inter alia, by an exchange of letters'.

[15] The Court of Appeal concluded that the 'trial court failed to consider

whether (MBf) had led sufficient evidence that the subscription agreement was a concluded contract ... and failed to appreciate that (Deutsche) failed to establish their defence that they had notified (MBf) of the need for and the absence of internal approval during the negotiations leading to the subscription agreement'. 'In our judgment, once the 'causes' in cl 7 of the mandate letter are excluded for the reasons contained in this judgment, it is apparent that there is overwhelming documentary evidence that the subscription agreement is a concluded contract based on the objective facts and regard being had to all the circumstance of this case'.

[16] On those reasons, the intermediate appeal was allowed, and MBf's claim was remitted to the registrar of the trial court for assessment of damages.

[17] Before us, learned counsel for Deutsche submitted: it was made clear at the onset that internal credit had to be obtained before Deutsche could be bound to any funding arrangement; Deutsche did not sign the SA by reason of the absence of internal credit approval; the mandate letter was the only document signed by all parties; by letter dated 12 November 2007, Deutsche informed MBf that internal credit approval had been refused; between 12 November 2007 to 28 November 2007, the parties exchanged emails on the alternatives proposed by Deutsche; on 26 November 2007, MBf gave notice that it considered the SA as a concluded contract; the tender of the initial subscription fee on 27 November 2007 was an afterthought, as MBf knew that internal credit approval had been refused; the thrust of MBf's case at the trial court was the alleged oral representation of one Raja Ali that internal credit approval was in place and MBf had executed the SA in reliance thereof; at the trial court, the case of MBf proceeded with recognition that internal credit approval was a pre-requisite for the execution of the subscription agreement; at the Court of Appeal, MBf's case was focused on the emails to establish a concluded contract; the Court of Appeal applied the conventional principles of contract formation, and the principle of an informal binding contract to bind Deutsche; the Court of Appeal attached little importance to the internal credit requirement; the principle of an informal contract was not appropriate to find a multi-million funding contract; the emails evinced that the question of internal credit approval was always at the forefront; the Court of Appeal was wrong to hold that internal credit approval was only a term of the mandate letter that lapsed when the SA came into being; under the Banking and Financial Institutions Act 1989, no banking financing on a commercial scale could take place without internal credit approval; the Court of Appeal was wrong to rely on *Charles Grenier v Lau Wing Hong* and *Lee Chin Kok v Jasmin Arunthuthu Allegakoen & Ors*, from only the three aspects of parties, property and price; in *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154, Lord Wilberforce pointed to a whole series of contract situations that do not fit the traditional mould of contract formation;

as was observed by Lord Greene in *Clifton v Palumbo* [1944] 2 All ER 497, that in the case of a large transaction, no one would dispense with a purchase contract; recently, in *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2007] 1 All ER (Comm) 124, the English Court of Appeal observed in general that 'the more complicated the matter the more likely the parties were to want to enshrine their contract in some document ... ' and endorsed the decision of the New Zealand Court of Appeal in *Concorde Enterprises Ltd v Anthony Motors Ltd* [1981] 2 NZLR 385, where Cooke J spoke of the normal inference that in transactions of some complexity, parties would not consider themselves bound until a formal agreement is drawn up and executed by both sides; in *Birse Construction Ltd v St David Ltd* (2000) 78 ConLR 121, the specialist construction court held that even if it could be said that all essential terms were agreed, it is still necessary to consider whether the parties intended to be contractually bound when the putative agreement had been scrutinised or when documents had been duly signed; in *GYC Financial Planning Pte Ltd and Another v Prudential Assurance Company Singapore (PTE) Ltd* [2006] 2 SLR 865, Judith Prakash J declined to uphold the existence of an oral contract in the case of a complex agency that required compliance with a governing statute; the provisions of BAFIA 1989 must be complied before funding of the receivables of the second respondent could be put in place; Deutsche could not have agreed to emails to form a binding agreement; Deutsche formally rejected the funding proposal on 12 November 2007; the proposal was being considered by the Risk Exposure Committee at Kuala Lumpur which awaited approval from the Credit Risk Management at Singapore/London; internal credit control and approval is a legal requirement under ss 65 and 67 of BAFIA 1989; Bank Negara Malaysia guidelines have the force of law; courts recognised that banks may rightfully act on internal guidelines (*Barclays Bank plc v O'Brien* [1994] 1 AC 180 and *Cornish v Midland Bank plc; (Humes, third party)* [1985] 3 All ER 513 were cited); it was not open to Raja Ali to dispense with a legal requirement (*Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783; [2009] 6 CLJ 501 was cited); the requirement for internal credit approval, which was stated in the mandate letter, was surprisingly discounted by the Court of Appeal; the mandate letter was the prelude to the SA which could not come into being without satisfaction of the conditions in the mandate letter; the email exchanges showed that both sides realised the need for internal credit approval; and, the Court of Appeal failed to realise that the amendments were significant.

[18] Learned counsel for MBf responded: the Court of Appeal correctly identified the three issues; the Court of Appeal followed well established principles laid down in *Charles Grenier Sdn Bhd v Lau Wing Hong*, *Lee Chin Kok v Jasmin Arunthuthu Allegakoen & Ors*, and *OCBC Capital Investment Asia Ltd v Wong Hua Choo* to find a concluded contract; all terms and conditions were agreed when the third draft of the SA, which had been approved by MBf, together with an email on 2 November 2007 at 6.58pm seeking confirmation

as to whether parties had further comments, were forwarded to MBf; the Court of Appeal was absolutely right to find that Deutsche could not rely on cl 7 of the mandate letter to justify refusal to sign the subscription agreement or deny the existence of a concluded contract; internal credit approval was an excuse to get out of a binding contract; the contingency of amendments was provided for in the subscription agreement; the extant documents pointed to a concluded contract; *locus poenitentiae* and specific performance were never raised in the courts below; leave questions 1, 2, 4, 5, 7, and 8 were not issues pleaded and or put before the Court of Appeal; the essential question at the trial was whether there was a concluded contract; grave injustice would be occasioned if Deutsche were allowed to raise new issues at the apex court (*Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293, *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141, and, *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640 were cited); it is settled that to find that a contract has been concluded, the court must find that the parties are at *ad idem*; there is no different rule for a complex contract; leave questions 3 and 6 suggest that funding transactions are subject to internal credit approvals, which could not be right; how are customers of banks to know the requirements; in the absence of circumstances to the contrary, customers are entitled to assume that internal credit approvals must have been complied with; locus poenitentiae has no relevance; pursuant to s 18 of the Specific Relief Act 1950, damages could be awarded in lieu of specific performance; pursuant to s 74 of the Contracts Act 1950, compensation could be awarded for loss or damage caused by breach of contract; a pursuer has a right to elect the remedy (*Johnson v Agnew* [1979] 2 WLR 487, and, *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 were cited); MBf was entitled to abandon the relief for specific performance; and, in the face of the refusal of the trial court to review the evidence that pertained to the issue of damages, the Court of Appeal was entitled to direct a re-hearing of the assessment of damages.

[19] The SA, which was executed by one but not the other, might have been a complex and intricate agreement. But yet this appeal only involves a question of basic contract law. One issue is whether or not the parties were at ad idem, which Lord Diplock explained, in *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854 at pp 915–916, in the following terms:

> To the formation of the contract of abandonment, the ordinary principles of the English law of contract apply. To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other, what is necessary is that the intention of each as it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of mind of the communication) should coincide. That is what English lawyers mean when they resort to the Latin phrase consensus ad idem and the words that I have italicised are essential to the

concept of consensus ad idem, the lack of which prevents the formation of a binding contract in English law.

Thus if A (the offeror) makes a communication to B (the offeree) whether in writing, orally or by conduct, which, in the circumstances at the time the communication was received, (1) B, if he were a reasonable man, would understand as stating A's intention to act or refrain from acting in some specified manner if B will promise on his part to act or refrain from acting in some manner also specified in the offer, and (2) B does in fact understand A's communication to mean this, and in his turn makes to A communication conveying his willingness so to act or to refrain from acting which mutatis mutandis satisfies the same two conditions as respects A, the consensus ad idem essential to the formation of a contract in English law is complete.

[20] But consensus ad idem on the terms alone is not enough to form a binding contract. ' ... in order for a promise to be legally enforceable as a contract, it must be intended to be legally binding, or, as it is more often put, the parties must intended to enter into legal relations ... the earliest judicial support for such a requirement in case law is in the judgment of Atkin LJ in *Balfour v Balfour* ... ' (*Butterworths Common Law Series, The Law of Contract* (3rd Ed) at para 2.169). 'The requirement of an intention to create legal relations, additional to the test of bargain, has been repeatedly critised by academic commentators' (see *BA Hepple* [1970] 28(1) CLJ 122 at p 127; see also *A W B Simpson* [1975] 91 LQR 247 at pp 263–265). But 'since the later nineteenth century, it has become common to say that in addition to the existence of an agreement (generally established through offer and acceptance) and consideration, the formation of an informal contract requires evidence of an 'intention to create legal relations' — that is, there is a substantive additional requirement that the parties intended their agreement to have legally binding force ... Each party agrees not only to the terms of the contract but agrees to it being a contract' (*Formation and Variation of Contracts* by Cartwright at p 55). When parties enter into it, there must be an intention to create legal relations (see *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14; see also *Hui Jia Hao v Perdana Park City Sdn Bhd & Anor* [2012] 8 MLJ 385; *Anuiti Enterprise (M) Sdn Bhd v Cubic Electronics Sdn Bhd* [2006] 6 MLJ 565; *Ahmad Zaini bin Japar v TL Offshore Sdn Bhd* [2002] 7 MLJ 604; *Jone Theseira v Eileen Tan Ee Lian & anor* [2002] 4 MLJ 629) or in circumstances in which such an intention must be ascribed to them (*Beesly v Hallwood Estates Ltd* [1960] 1 WLR 549 at p 558; see also *Sutton and Shannon on Contracts* (6th Ed) at p 54).

[21] 'But where a claim is based on a proved or admitted express agreement, the courts do not require, in addition, proof that parties to an ordinary commercial relationship actually intended to be bound' (*Treitel's The Law of Contract* (13th Ed) at para 4–026). 'In the case of agreements regulating business relations it follows almost as a matter of course that the parties intend

legal consequences to follow' (*Sutton and Shannon* at p 55). ' ... each party (in commercial contracts) will normally be entitled to assume that a legally-binding agreement had been formed, and so the courts will normally accept that there is a contract as long as the agreement, supported by consideration, is established; they do not require affirmative proof of the parties' intention and indeed, they will presume the intention unless there is proof of no such intention ... one way in which parties may indicate expressly that they do not intend to be legally bound is by expressing pre-contractual negotiations to be 'subject to contract'. But even when the negotiations between commercial parties are complete, they may include in their agreement a provision making clear that it creates no legal commitment' (*Formation and Variation of Contracts* by Cartwright at pp 57–58). 'It is perfectly possible for the parties to an apparent contract to provide that there shall be locus poenitentiae until the terms of their agreement have been reduced to a formal contract ... ' (*Stobo Ltd v Morrisons (Gowns) Ltd* 1949 SC 184 at p 192 per Lord President Cooper). ' ... the contract would be concluded when there is agreement formed by the unequivocal acceptance of an offer; and in the case of a written contract there will typically be such an agreement before the final written text is signed by the parties. In order, therefore to ensure that no prematurely binding contract is concluded through the exchanges, whether oral or written, by which the parties come to their agreement, it should be made clear that the parties will not be bound until they have signed a written document which will itself form the contract. The simplest way to achieve this is to make the negotiations expressly subject to contract' (*Formation and Variation of Contracts* by Cartwright at pp 107–108). 'These words negative contractual intention, so that parties are not normally bound until formal contracts are exchanged' (*Chitty on Contracts* (30th Ed Vol 1) at paras 2–161, see also paras 2-116–2-120). 'This terminology was traditionally confined to negotiations for the sale of land, but is now more widely used in commercial transactions' (*The Construction of Contracts* by Gerard McMeel (2nd Ed) at para 14.14).

[22] Unless required by law, the formality of an executed contract is the exception rather than the rule. 'The general rule is that contracts can be made informally' (*Treitel's* at para 5–003), 'unless it belongs to some class in which a particular form is specially required' (*Pollock on Contracts* (11th Ed) at p 118). Where formality is by choice, 'it provides a mechanism for a transaction which the parties will follow if they wish their transaction to have certain effects, although they could carry out the transaction without the formality' (*Formation and Variation of Contracts* by Cartwright at p 129).

[23] If formality of an executed contract is by choice, it should be made clear that parties are not bound until execution of the formal contract. In *Rossiter v Miller* (1878) 3 App Cas 1124, W was authorised to sell a piece of land divided

into lots. Certain conditions, on which the land might be let or sold, were printed on the plan of the lots. M made inquiries of W as to the sale of certain lots. W expressly informed M that he must purchase subject to the conditions stated on the plan. One of these conditions required that a purchaser should execute a contract embodying the conditions. M offered to purchase these lots at a price which he named. W later informed M that the proprietors had accepted his offer; adding, that in reducing the price they had taken into consideration his intention of soon building on the land. W added that he had instructed solicitors to forward to M the agreement for purchase. There was, in fact, nothing in the conditions which bound a purchaser to build, though there were provisions which assumed that he might do so. M wrote back that he could not be bound to build at any given time, or at all, and that the subject had better be reconsidered, unless W was prepared to leave him to do as he might think best. W replied that the acceptance of the offer was without condition, and that M was free to do what he might think best. M afterwards declined to complete the purchase. The House of Lords held that what had taken place by the correspondence constituted a complete contract between the parties; that under such circumstances the execution of a formal deed was not necessary; that the reference to it in W's letter did not suspend or in any way affect the contract; and that M was bound specifically to perform his contract of purchase.

[24] Lord Cairns LC drew the distinction between an unqualified acceptance and an acceptance subject to the condition that an agreement is to be prepared and agreed upon between parties:

> And then Lord Westbury uses these words (1), 'I entirely accept the doctrine contended for by the Plaintiff's counsel, and for which they cited the cases of *Fowle v Freeman* (2), *Kennedy v Lee* (3), and *Thomas v Dering* (4), which establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract.' Up to that point it appears to me that these words exactly describe the case which your Lordships have before you. But the words which are relied upon by the learned Judges in the Court of Appeal are the words which follow: 'But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. And this appears to me to be the real state of the case before me, for I am clearly of opinion that the true and fair meaning and legal effect of the letter of the 19th of November may be expressed in these words: 'I will go on with the treaty for the sale to you of my house, and for that purpose will send you the form of the contract which I am willing to enter into.' I take, therefore, the letter of the 19th of

November either as a conditional acceptance of the Plaintiff's terms, subject to the draft contract being agreed to, or as an expression of willingness to continue the negotiation, and for that purpose to propose a form of agreement.

My Lords, I can only say that I am willing to accept every word of Lord Westbury as there given. I assume that the construction put by him upon the letter I have quoted was a proper construction, and I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made.

[25] Lord Hatherley agreed that an oral agreement stands, unless the terms of the agreement itself provide that it should be concluded by a formal contact:

It has been established for far too long a time, and by some precedents in your Lordships' House, that if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, we will have this agreement put into due form by a solicitor. If it is stated in so many plain and express terms (and in *Chinnock v The Marchioness of Ely* that was the ground on which that case proceeded) that one of the very terms of the agreement itself was that it should not be concluded by the agent employed in the first place to enter into the negotiation, and that it should not be a concluded agreement until a solicitor intervened and drew a formal agreement; if you find that to be a term of the agreement itself, well and good, if not, the agreement stands. Both parties may desire that it shall be put into a formal shape by a solicitor who, in that case, will not be able to vary the agreement either on one side or the other, but only to put into a more formal and professional shape the agreement which had been completely formed with unity of purpose with reference to the sale and purchase by the two parties to the contract.

[26] And Lord Blackburn imparted that parties ought not to be bound until the execution of a formal agreement, if that appears to be the intention, which is a question of construction of the evidence:

Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent

> what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement. If I thought with Lord Justice Baggallay that the letters here 'left the Defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement,' I should also think that the Plaintiffs failed; but I cannot put that construction on the letters. If I understand Lord Justice James rightly, he thinks that, in practice, persons who really meant only to enter into such a preliminary negotiation may be held bound contrary to their intention, and I do not doubt that this sometimes happens. I infer, though of this I am not quite sure, that he wishes it to be a canon of construction that, wherever there is a stipulation for a farther and more formal agreement, the previous arrangements should be held to be only of this preliminary nature. I doubt whether such a canon of construction would not often defeat the intention of the parties; but I think it is too late now to introduce it. I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up.

[27] 'Whether the parties have agreed to exclude the possibility of legal enforceability depends on the proper construction of the words used. If they clearly express an intention not to be legally bound the court will give effect to their intention' (*Butterworths Common Law Series* at para 2.179). 'The test of an intention to effect legal relations is an objective one' (*Anson's Law of Contract* (28th Ed) at p 71). ' ... the court adopts an objective approach, having regard to what the parties said and did in the course of negotiations ... It ask what would reasonable and honest men in the position of the parties and having their shared knowledge of the surrounding circumstances have under stood by the communication passed between them' (*Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSOH 95, per Lord Hodge).

[28] But it should be added that it does not necessarily follow that 'subject to contract' intractably mean that parties remain in negotiations. For cases are not the same, when parties who have been in negotiations reach agreement upon terms of a contractual nature and agree that the matter of their negotiations shall be dealt with by a formal contract. That was underscored in the following two authorities.

[29] In *Love and Stewart Ltd v S Instone & Co Ltd* (1917) 33 TLR 475 at p 476, Lord Loreburn enunciated:

> It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectations that one would by consent insert in it a number of further terms. If that were the intention of the parties, then a bargain had been made, nonetheless that both parties felt quite sure that the formal document could comprise more than was contained

in the preliminary bargain. But if the intention were that what was agreed in the first instance should be subject to the completion of the formal document, then there was no bargain while that condition unfulfilled. Also, of course, there was no bargain if the parties had not agreed on a set of terms at all, either absolutely or conditionally. One had therefore, in cases of this kind, to ascertain what was the intention common to both parties.

[30] The different cases of 'subject to contract' were more clearly detailed in *Masters v Cameron* (1954) 91 CLR 353, which established key principles to determine whether or not an intention to be legally bound exists in pre-contract agreements, where the facts were as follows. C agreed, by a memorandum of 6 December 1951, to sell a certain pastoral property to M. The final sentence of the memorandum provided 'This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions, and to the giving of possession on or about the fifteenth day of March 1952'. The trial court decided that a binding contract was concluded.

[31] On appeal, the first question was whether the memorandum constituted a binding contract. Dixon CJ, McTiernan and Kitto JJ, observed that all the essentials of a contract — the parties were agreed that there should be a sale and purchase, and the parties, the property, the price, and the date for possession were all clearly settled — were there, 'but whether there is a contract depends upon the meaning and effect of the final sentence of the memorandum':

Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

(The above passage was cited with approval in *Charles Grenier Sdn Bhd v Lau Wing Hong*).

[32] Dixon CJ, McTiernan and Kitto JJ held that there is a binding contract in each of the first two cases:

In each of the first two cases there is a binding contract: in the first case a contract

A binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

B

[33] On the third case, Dixon CJ, McTiernan and Kitto JJ held that the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own:

C Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own: *Governor & c of the Poor of Kingston-upon-Hull v Petch* (1854) 10 Exch 610 (156 ER 583). The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document, as in *Summergreene v* D *Parker* (1950) 80 CLR 304 or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed. These possibilities were both referred to in *Rossiter v Miller* (1878) 3 App Cas 1124. Lord O'Hagan said: 'Undoubtedly, if any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, E matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed. But when an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be F made' (1878) 3 App Cas, at p 1149. And Lord Blackburn said: 'parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not G represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement' (1878) 3 App Cas, at p 1152. So, as Parker J said in *Von Hatzfeldt-Wildenburg v Alexander* (1912) 1 Ch 284, at p 289 in such a case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract.

H

[34] As to whether there is a special form of words to be used in order that there shall be no binding contract before the execution of the agreement, Dixon CJ, McTiernan and Kitto JJ set out the purport of 'subject to contract' I and propounded that so long as the intention is disclosed by the language employed by the parties, there is no special form:

The question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their

agreement in its ultimate shape: *Farmer v Honan* (1919) 26 CLR 183. Nor is any formula, such as 'subject to contract', so intractable as always and necessarily to produce that result: cf *Filby v Hounsell* (1896) 2 Ch 737. But the natural sense of such words was shown by the language of Lord Westbury when he said in *Chinnock v Marchioness of Ely* (1865) 4 De GJ & S 638 (46 ER 1066): 'if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation' (1865) 4 De GJ & S 638, at p 646 (46 ER, at p 1069). Again, Sir George Jessel MR said in *Crossley v Maycock* (1874) LR 18 Eq 180: 'if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the court will enforce' (1874) LR 18 Eq, at pp 181–182.

This being the natural meaning of 'subject to contract', 'subject to the preparation of a formal contract', and expressions of similar import, it has been recognized throughout the cases on the topic that such words prima facie create an overriding condition, so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract. Indeed, Lord Greene MR remarked during the argument in *Eccles v Bryant and Pollock* (1948) Ch 93, at p 94 that when the expression 'subject to contract' was used he had never known a case in which it had been suggested, much less held, that this did not import that there was nothing binding till the exchange of parts of the formal contract was made. The effect of the early cases on the subject was stated by Sir George Jessel MR in *Winn v Bull* (1877) 7 Ch D 29 when he said in a passage which has become well-known: 'It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail' (1877) 7 Ch D, at p 32.

[35] Valuable guidance was also imparted in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, where Lloyd LJ laid down the following summary of principle, which was approved by the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Miller GmbH & Co KG*:

(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole ...

(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.

(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed ...

> (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled ...
>
> (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
>
> (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by (Bingham J, at first instance in that case, [1987] 2 Lloyd's Rep p 611) 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'.

[36] Local authorities had not distinguished the different cases of 'subject to contract'. Some earlier authorities equated the expression 'subject to contract' to a term or condition of the bargain (see *Koh Peng Moh v Tan Chwee Boon* [1962] 1 MLJ 353, *Tai Tong Realty Co (Pte) Ltd v Galstaun & Anor* [1973] 2 MLJ 95, and *Ong Chong Soo v Tan Eng Tai & Anor* [1982] 1 MLJ 307).

[37] But by and large, the preponderance of local authorities, right down to the present, constructed the expression 'subject to contract' from the intention of the parties. The move away from equating the expression 'subject to contract' as a term or condition of the bargain to the giving of effect to the intention of the parties probably started in *Low Kar Yit & Ors v Mohamed Isa & Anor* [1963] 1 MLJ 165, where Gill J, as he then was, reviewed the authorities including *Rossiter v Miller*, and held that if it appears that the parties do not intend to bind themselves contractually by the agreement but only by the subsequent contract if and when they should enter into it, there will be no contract:

> The authorities would appear to support the view that even where there is nothing in the agreement to suggest that the parties contemplate that the subsequent

> contract shall contain any new or different terms, nevertheless if it appears that the parties do not intend to bind themselves contractually by the agreement but only by the subsequent contract if and when they should enter into it, there will be no contract. Moreover, if the reference to the execution of the subsequent contract is in words which according to their natural construction import a condition, this will almost invariably be conclusive that the agreement itself was not intended to be a contract. To my mind this was true of this case. It will bear repetition if I say that when the actual phrase 'subject to contract' is used, the courts tend to give effect to those words unless there is strong evidence to the contrary. The result is that the agreement which is made 'subject to contract' is of no legal effect. Perhaps I should add that the plaintiffs in this case are asking the court to order the defendants to execute the draft agreement agreed upon, which amounts in effect to asking the court to enforce an agreement to enter into an agreement. That is an order which the court clearly has no power to make in the circumstances of the case.

[38] But reverence for fixed expressions like 'subject to contract' was disapproved in *Daiman Development Sdn Bhd v Matthew Lui Chin Teck & anor appeal* [1981] 1 MLJ 56, where the Privy Council was categorical that the question whether parties have entered into contractual relationships depends upon the proper construction of the expressions employed, rather than by the presence or absence of certain expressions:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangements might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words. But, in general, employment of the formula 'subject to contract' as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations.
>
> The High Court of Australia (Dixon CJ, McTiernan and Kitto JJ) had before it in *Masters v Cameron* (1954) 91 CLR 353 the terms of a written arrangement signed by parties which contained the following:
>
> > This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions and to the giving of possession on or about the 15th March 1952.
>
> Although the terms of the arrangement as set out in the writing might be said to include all the requisite terms of the transaction into which the parties proposed to enter, the subjection of their arrangements to the approval of their solicitors was

> held in the circumstances to preclude contractual obligations from presently arising. The distinction between a condition, which precludes the present existence of contractual obligations, and a condition or qualification of the contractual obligations themselves, is clearly indicated in those reasons which are expressed with clarity. An accurate analysis of the relevant case law and of the fundamental principles to be observed in resolving a question such as arises on the appellant's first submission is to be found in those reasons. Their Lordships are content to adopt them as accurately expressing the relevant principles and the result of the relevant authorities. Their Lordships find no need themselves to discuss them.

[39] Gunn Chit Tuan J, as he then was, in *Diamond Peak Sdn Bhd & Anor v Dr Tweedie* [1982] 1 MLJ 97, similarly held that there is no special form of words to put negotiations within the 'subject to contract' principle:

> It is true, as also contended by counsel for the defendant, that even where the phrase 'subject to contract' is not used, similar expressions may be used and inference may be drawn from the whole of the correspondence and conduct of the parties that it was intended that an agreement should come within the 'subject to contract' principle.

[40] In *Lim Keng Siong & anor v Yeo Ah Tee* [1983] 2 MLJ 39, the appellant wrote, 'I confirm, subject to contract, that the lowest price I am willing to sell the said property is $5.40 per square foot in Singapore currency, the sale and purchase to be completed latest by March 24, 1976. 10% deposit to be paid within the course of the next few days if your buyer Mr Yeo Ah Tee agrees to the price and the terms'. That offer was accepted, but the appellants refused to complete the agreement. The respondent applied for specific performance. The respondent averred that there was a concluded contract. In their defence, the appellants pleaded that the sale was subject to contract. Wan Yahya J, as he then was, ordered specific performance. On appeal, it was held by Abdul Hamid FJ, as he then was, delivering the judgment of the court, that on the evidence and exhibits it was the intention of the parties to come to a definite and complete agreement on the sale and the mere fact that a written agreement had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement.

> Here again we choose to hold that for the appellants to rely on formal execution of a contract as an essential condition of the bargain it certainly cannot be founded on the basis of the letter of March 1, 1976 but fundamentally on a finding of fact, if any, that in the circumstances of this case it was indeed a condition or term of the contract. No such finding was made by the learned Judge and we see nothing to contradict that finding. Even assuming for a moment that term 'subject to contract' as contained in the appellants' letter of March 3, 1976, we see no reason to construe the phrase as anything more than, to borrow the words used in Von *Hatzfeldt-Wildenburg*'s case, 'a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through'. We refer to and respectfully agree with the exposition of the principle in *Master v Cameron* 91

CLR 353 cited with approval in *Daiman Development Sdn Bhd v Matthew Lui Chin Teck* [1981] 1 MLJ 56.

[41] In *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108, the terms of the said document contained a proviso 'that the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989' or otherwise the deposit was to be refunded to the respondent. A sale and purchase agreement was subsequently prepared and signed by the respondent only, and sent to the appellant's solicitors. The agreement included two new conditions, to which the appellant did not agree. The deposit was refunded to the respondent. The trial judge found that there was a binding and concluded agreement and ordered specific performance. On appeal, it was held by Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court, that there need not be the very words 'subject to contract' to have the effect arising from such formula, but that the formula 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract, which presumption could only be displaced by cogent evidence:

> Looking at the said document, one was struck immediately by a proviso contained therein, a proviso very similar to the phrase or formula of 'subject to contract' which conveyancing lawyers are prone to employ. There need not be the very words of the said formula in order to have the usual effect arising from the use of such formula; similar phrase or words would achieve the same result, as shown in numerous past cases. Just to quote one example, in *Winn v Bull*, the words used were: 'subject to the preparation and approval of a formal contract'; they were treated as having the same effect as if the formula of 'subject to contract' were used.
>
> In connection with the proviso contained in condition 3 of the said document, the question arose as to whether that proviso in our view would be equivalent to having the formula of 'subject to contract' inserted in the said document.
>
> First, the proviso, stated as a proviso to condition 3 to which the sale of the said land would be subject, postulated very clearly the making of a sale and purchase agreement that would also include other 'usual terms and conditions'. What would be the usual terms and conditions remained largely a matter of conjecture, thus the words would create uncertainty unless a contract containing these agreed 'usual terms and conditions' had been signed by the parties. Then again, the proviso to condition 3 further stated that the agreement had to be signed on or before 18 March 1989, failing which the deposit of RM90,394.20 would be refunded to the plaintiff free of interest without demand. We were of the view, therefore, that the proviso would have the same effect as if the formula of 'subject to contract' had been in the said document. We now elaborate on the formula.
>
> It is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract, 'formal' be it noted, is not to be understood in the common parlance as being just a 'mere formality' of no importance. As Sir Garfield Barwick who delivered the opinion in Daiman said (at p 58): 'But, in general, employment of the formula 'subject to contract' as a

condition of their arrangement will preclude the present assumption by the parties of contractual obligations'. We did not think it necessary to set out here a great number of past cases to illustrate such similar effect, and we think that just mentioning one of the more recent cases in addition to the case of *Winn v Bull*, will suffice; that extra case is *Derby & Co Ltd v ITC Pension Trust Ltd & Anor*. From the host of such past cases, the principle is clear, it requires cogent evidence to displace this strong presumption. This court enquired: Was there such cogent evidence? The appellants have appealed.

[42] Soon after *Kam Mah Theatre v Tan Lay Soon*, the Supreme Court, in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, had to deliberate on another 'subject to contract' agreement. YC Chin had entered into negotiations to construct low-cost houses and shophouses for Ayer Hitam Tin Dredging ('AHTD'). By letter, AHTD accepted YC Chin's proposals, subject to certain terms and conditions, one of which was that the terms and conditions in the letter were to be constituted in an agreement between YC Chin and AHTD and that appropriate indemnity clauses in favour of AHTD were to be incorporated in the agreement. In reliance upon the letter, YC Chin proceeded to perform some of their obligations stated therein, although no formal agreement in writing had been executed. Subsequently, AHTD instructed YC Chin to cease all work, stating their intention to discontinue negotiations and that any work done had been entirely at YC Chin's risk. AHTD contended that the work had been done before the coming into being of any contract and that the letter was part of ongoing negotiations for a future agreement. YC Chin submitted that all essential terms had been agreed and all that remained to be done was to put the terms into the form of a contract. The trial judge found that there was a contract and allowed YC Chin's claim for breach. On appeal, the Supreme Court per Edgar Joseph Jr SCJ, later FCJ, delivering the judgment of the court, held and observed:

> But it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v Denn*) or 'subject to the preparation and approval of a formal contract' (see *Winn v Bull*) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.
>
> We say 'generally' because in exceptional circumstances, the 'subject to contract' formula will not be so intractable as always and necessarily to prevent the formation of a contract (see, for example, *Richards (Michael) Properties Ltd v Corp of Wardens of St Saviour's Parish Southwark*, *Alpenstow Ltd v Regalian Properties plc*, *Filby v Hounsell*)
>
> We hasten to add, however, that in both Richards and Alpenstow the court made it clear that nothing in the judgment was intended to throw doubt on the effect in law of the time-honoured expression 'subject to contract'. Indeed, in *Chinnock v Ely (Marchioness) 10* at p 646, Lord Westbury said this:

> ... if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.

[43] In *Charles Grenier v Lau Wing Hong*, the appellant/vendor contended that the agreement to sell was subject to contract, on account of the phrase 'subject to the sale and purchase agreement' appearing in the first letter, and that the terms had not been agreed upon. The issues before the court were: (i) whether there was a valid and enforceable agreement between the vendor and the purchaser; and (ii) if the answer was in the affirmative, whether that agreement had been frustrated by the grant of the injunction in question. It was held by the Federal Court per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, 'that the phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, it is, when read in the context of the correspondence and the objective aim of the transaction — and this is how we read them — indicative of an intention to merely formalise the agreement already concluded between the parties'.

[44] In *Lee Chin Kok v Jasmin Arunthuthu Allegakoen & Ors*, the respondents put up properties for sale through an estate agent who wrote a letter marked 'Without prejudice and subject to contract' to the appellant confirming the appellant's interest in purchasing the property at RM215,000. The letter contained other terms and conditions. The respondent wrote a letter to the estate agent changing the conditions as stated in the agent's earlier letter to the appellant. The properties were subsequently sold to a competing purchaser. The appellant's claim against the respondent was dismissed by the High Court. On appeal, it was held by the Federal Court per Abdul Malek Ahmad FCJ, as he then was, delivering the judgment of the court, that each case must turn on its own facts, and that on the facts, there was no concluded contract.

[45] In *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42, where the proforma of sale of a property used the phrase 'subject to contract', it was held by the Court of Appeal per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, that 'It does not follow as night follows day that just because the words 'subject to contract' appear in a proforma, that there is no concluded contract. This proposition is well illustrated by the decision of the former Federal Court in *Lim Keng Siong & Anor v Yeoh Ah Tee* [1983] 2 MLJ 39'.

[46] Hence, it is the intention of the parties, as construed from the evidence, and not the expression 'subject to contract', which determines whether parties are in negotiations. 'Where there is an informal agreement which expressly

requires or envisages the subsequent execution of a formal contract, the legal effect of that prior informal agreement at common law depends on the intention of the parties' (*Halsbury's Laws of England* ((5th Ed) Vol 22 at p 270). Perhaps, there is no better example of parties still in negotiations than *Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang* [2006] 4 MLJ 656, where the memorandum of understanding provided that the MOU was subject to the consent of the general body to the proposal, the consent of the High Court, and a final agreement being concluded between the parties after their lawyers have studied and advised on the matter, which said provisions were construed by the Court of Appeal per Mokhtar Sidin JCA, delivering judgment of the court, to mean that the parties were still negotiating and did not intend to be bound until a formal contract is exchanged.

[47] To sum up, without consensus ad idem, there is no concluded contract. But consensus ad idem on just the terms is not enough to form a concluded contract. In addition, there must be the intention to create legal relations and consideration. In most commercial agreements, the court will presume that intention (see *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer* by John Cartwright at p 140), unless there is proof of no such intention. Formality is the exception and not the rule. It does not follow that just because of the expression 'subject to contract' there is no concluded contract. But if formality is by choice, it should be made clear that parties are not bound until the execution of a formal agreement. ' ... if the intention were that what was agreed in the first instance should be the subject to the completion of the formal document, then there was no bargain while that condition remain unfulfilled. Also, of course, there was no agreement if the parties had not agreed on a set of terms at all, either absolutely or conditionally' (*Love and Stewart Ltd v S Instone & Co Ltd (1917)* per Lord Loreburn).

[48] But alas, both courts below, with respect, had approached the core issue — whether or not there was a concluded agreement on 2 November 2007 — from only the aspect of consensus ad idem. There was no deliberation of the intention to create legal relations. To be fair, the trial court needed not, since it was its finding that there was no consensus ad idem on the terms, to deliberate on the intention to create legal relations. But there was no reason for the Court of Appeal not to proceed to deliberate on the intention to create legal relations, since it was its finding that there was consensus ad idem on the terms. 'The intention to be bound is a jural act separate and distinct from the terms of the bargain' (*Air Great Lakes Pty Ltd v K S Easter (Holdings) Pte Ltd* (1985) 2 NSWLR 309 per McHugh JA). To conclude that there was a concluded contract, merely on account of a finding of consensus ad idem on the terms, was a serious misdirection by the Court of Appeal. As said, the presumption of intention to create legal relations could be negatived. Clause 7 of the mandate letter provided that there should be a separate agreement, if Deutsche were to

underwrite the notes or provide financing.

[49] If Deutsche were to provide financing, the mandate letter could not be the agreement. There must be a separate agreement. If Deutsche were to provide financing, the SA would be that separate agreement as envisaged in the mandate letter. But even though the SA was that separate agreement as envisaged in the mandate letter, yet it did not follow that there was a binding contract. For there were conditions to be fulfilled before a separate agreement could bind the parties. Quite apart from internal credit approval, it was also a condition that a separate agreement must be 'completed and executed' before the parties were legally bound. Was that duly completed and executed separate agreement not a formality by choice? Was it not made clear that parties were not bound until execution of the formal contract which would itself form the contract? Was that not amply clear in the mandate letter? In the opening paragraph of the mandate letter, Deutsche accepted its appointment as lead arranger and lead manager to provide advisory services for financing secured on a portfolio of credit card receivables of the second respondent. Clause 1 set out the advisory services to be provided. Clause 2, a lock-out clause, provided that Deutsche was the only party engaged to provide the said advisory services. Clauses 3 and 4 stipulated the fees and expenses payable to Deutsche for the said advisory services. Clauses 5 and 6 provided for the early termination and or expiry of Deutsche's appointment as lead arranger and lead manager. Clause 7 provided 'that were Deutsche Bank to underwrite the notes or provide financing to client or any other person or entity, the terms and conditions of such transactions would be subject to separate agreements between client, Deutsche Bank and/or such other person or entity. Nothing in this agreement shall be construed as an obligation on the part of Deutsche Bank or any member of the Deutsche Bank Group to enter into any swap transaction with or to provide any financing to client or any other person or entity or to underwrite the notes. Deutsche Bank's obligations hereunder, are expressly subject to the satisfaction of the following conditions'.

[50] The mandate letter must be read as a whole. And when read as a whole, but which the Court of Appeal failed, with respect, to do, it is unmistakable that the mandate letter was a composite of bargains. It was a bargain on the said advisory services. And it was also a bargain for the formation of a binding contract, that is, if Deutsche were to finance and if the conditions in cl 7 had been fulfilled. The purport of the mandate letter was very clear. While Deutsche was the lead arranger and lead manager, it had the option to underwrite the notes or provide financing. And if Deutsche so opted to underwrite the notes or provide financing, cl 7 provided 'that the terms and conditions of such transactions would be subject to a separate agreement'. Clause 7 further provided that nothing in the mandate letter 'shall be construed as an obligation on the part of Deutsche Bank or any member of the Deutsche

Bank Group to enter into any swap transaction with or to provide any financing to client or any other person or entity or to underwrite the notes'. It is so clear and unambiguous that the mandate letter could not give rise to any obligation on the part of Deutsche to provide financing. For that commitment by Deutsche, there must be a separate agreement which itself was subject to the satisfaction of eight conditions. Of the pertinent conditions, condition (g) required internal credit approval to have been obtained by Deutsche, and condition (h) required 'the completion and execution of mutually satisfactory documentation, and the satisfaction of conditions contained therein'.

[51] Clause 7 provided that all eight conditions must be fulfilled before any separate agreement could bind Deutsche. So even if internal credit approval had been obtained, which was disputed by Deutsche who should know best as to whether it had or had not been obtained, there was yet condition (h) that remained unfulfilled. Given that the manner in which the parties had proposed to enter into a binding contract was provided by cl 7 (see *Carruthers v Whitaker* [1975] 2 NZLR 667, where it was held by the New Zealand Court of Appeal that the manner in which a contract is to become binding must be gathered from the intentions of the parties express or implied), it is so clear from the mandate letter, from a plain and natural reading of it, that the parties plainly contemplated the execution of a separate agreement as a pre-requisite to the conclusion of a binding contract. And in relation to that latter intention, there is nothing in any of the correspondence or emails to suggest that Deutsche had waived the formality of an executed agreement (see *Cohen v Nessdale Ltd* [1982] 2 All ER 97, where it was held by the English Court of Appeal that a 'subject to contract' qualification, once introduced into negotiations, could only cease to apply to the negotiations if the parties expressly or by necessary implication agreed that it should be expunged; see also *Contract Law*, by John Cartwright at p 70; see also *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189, where it was held by Waller LJ Waller (Dyson and Lloyd LJJ agreeing), that the finding of the trial judge, that there was no complete agreement on the terms and that neither had resiled from 'subject to contract', was unassailable; see however *Haq v Island Homes Housing Association and another* [2011] EWCA Civ 805, where it was held Lloyd LJ (Arden and Tomlinson LJJ agreeing) 'that it is not open to one party alone to convert their status from being subject to contract … it has to be bilateral and not unilateral'; see also *Oceanografia SA de CV v DSND Subsea AS* [2006] EWHC 1360 (Comm) at paras 89–91).

[52] Like *Kam Mah Theatre v Tan Lay Soon* and *Kheam Huat v Indian Association*, where there were conditions to be first fulfilled, cl 7 had set out the agreed conditions for the formation of a binding contract. And by reason of the non-fulfilment of the condition (h) of cl 7, no separate agreement could come into being as a binding contract. Clause 7 was the bridge from mandate letter

to separate agreement. Clause 7 was an integral and inseparable part of the mandate letter. That it could be ignored by the Court of Appeal who held that it was inapplicable, was, with respect, against all canons of construction. The Court of Appeal held that cl 7 should be incorporated in the separate agreement. But with respect, cl 7 was the bargain for the formation of a binding contract. Clause 7 was only pertinent and alive when parties were in negotiations. But if the separate agreement had come into being as a binding contract, there was no reason to incorporate cl 7 which had served its purpose (see *Petromec Inc and others v Petroleo Brasileiro SA Petrobas and others* [2005] EWCA Civ 891 at paras 78 and 81). Incorporation then of cl 7 in the subscription agreement would not serve any purpose. But no separate agreement could come into being as a binding contract without fulfilment of cl 7, which was the litmus test. Yet cl 7 was cast aside, like unwanted baggage. Simply put, we could not, with respect, even faintly support the Court of Appeal's construction of the mandate letter. Against the backdrop of facts/circumstances and pertinent law, we have read and re-read the mandate letter as a whole. But each time we tried to read it any differently, we could only construct the mandate letter to mean that execution of the SA was an agreed term for the formation of a binding contract. The formality of an executed agreement was by clear choice. It was agreed that without Deutsche's execution of a separate agreement, there could be no binding contract to provide financing. Deutsche had not signed the SA. 'That alone would show that no binding agreement had been arrived' (*Love and Stewart Ltd v S Instone & Co Ltd*).

[53] There would have been no issue on the terms, had the SA been executed by both sides. But there was no executed agreement. Whether or not the parties had reached consensus ad idem on the terms, on 2 November 2007 could only be gleaned from the mandate letter, the emails/letters and conduct of the parties (see *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401, where Lord Denning propounded that the better way to find an agreement 'is to look at all the documents passing between the parties, and glean from them or from the conduct of the parties, whether they have reached agreement on all material points ... ' and *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* where Lord Clarke stated that 'whether there is a binding contract ... depends ... not on the subjective mind, but upon a consideration of what was communicated between them by words or conduct ... ') from the perspective of the notional reasonable man (see *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754).

[54] The Court of Appeal picked out isolated bits of the emails to find consensus ad idem on the terms. Except that the set of emails and correspondence had a different tale. In June 2007, Deutsche gave a presentation on securitisation opportunities to MBf. At about the same time,

on 4 June 2007, CIMB Investment Bank Bhd also offered its services to MBf as its sole principal adviser/lead arranger/lead manager etc for the proposed securitisation of MBf's card receivables. MBf had two suitors. What transpired immediately thereafter was not in evidence. But three months later, by email dated 25 September 2007, Deutsche messaged MBf on 'structure, pricing and internal approval', and by email dated 28 September 2007, Deutsche forwarded a paper on securitisation opportunities to MBf. That was followed by MBf's letter dated 1 October 2007 to Deutsche, which enclosed various documents, and by MBf's memorandum dated 3 October 2007 to Deutsche, which enclosed other information. By email dated 3 October 2007, Deutsche requested further data from MBf. Just minutes later, by email, Deutsche forwarded a draft mandate letter 'for discussion at 2pm' to MBf. That same afternoon, Deutsche forwarded a revised draft mandate letter to MBf. On 8 October 2007, Deutsche and the first respondent executed the mandate letter. Internal credit approval was raised in MBf's email dated 16 October 2007 to Deutsche, wherein MBf enquired 'did your credit committee discuss our proposal yesterday?' On 18 October 2007, Deutsche presented a 'Securitisation of Credit Card Receivables, Kick-Off Book' to MBf. Meantime, solicitors were in communication on the draft agreements. On 24 October 2007, Raja Ali of Deutsche enquired from Barry Weisbatt of Deutsche Singapore, on the outcome of the meeting with the credit committee. By email dated 25 October 2007, Deutsche forwarded a revised draft SA, subject to changes, to MBf. Shortly thereafter, Barry Weisbatt instructed Raja Ali to ignore the draft SA, which, allegedly, were full of mistakes. Between 25 October 2007 to 29 October 2007, solicitors were still in negotiations on the terms of the draft agreements. By 31 October 2007, MBf had furnished all required documents to Deutsche (see 1620–1623, 1625, 1627 of the appeal record). Deutsche then specified Deutsche's 'KYC requirements'. On 1 November 2007, Deutsche's solicitors forwarded the second draft SA to MBf's solicitors, with the remark 'this draft remains subject to any further comments that DB may have' (1654AR).

[55] Against that backdrop, Deutsche, on 2 November 2007 at 11:19, sent the following email, which the Court of Appeal picked out to support its finding on consensus ad idem, to its solicitors:

> To Pu Wei,
>
> Are there any further comments with respect to the agreement? Would it be possible to finalise the agreement by this afternoon as we understand that the MBF representatives will be away the whole of next week, and thereby would need to sign off by today.
>
> Galveender Kaur

[56] Probably so galvanised, solicitors/parties then exchanged no less than

eight emails (1673–1678, 1680–1682AR) on amendments to the second draft SA. On 2 November 2007 at 18:58, Deutsche's solicitors forwarded a third draft SA to Deutsche and MBf, which was another email picked out by the Court of Appeal to support its finding on consensus reached (see p 20 of the judgment of the Court of Appeal), with the following message (see 1683AR):

> Dear all, please find attached a third draft of the subscription agreement. Would all parties revert with their confirmations whether they have any further comments so that we may proceed to finalise the document.

[57] About 15 minutes later, Deutsche's solicitors requested MBf/solicitors 'to revert with their written confirmation as to whether we may proceed to finalise the draft'.

[58] By email at 19:44, Deutsche's solicitors transmitted the following email to MBf's solicitors:

> Sure, will do so once DB confirms that we may proceed to fair the same. Thanks
>
> Pu Wei

[59] MBf's solicitors responded, with the following two emails:

> 2.11.2007 at 19:48
>
> Dear Pu Wei,
>
> We are OK with the draft. Would be grateful if you could let us have the final copy of the agreement as soon as possible. Many thanks.
>
> Regards, Soo Ching
>
> 2.11.2007 at 20:15
>
> Dear All,
>
> Our clients have informed us that as agreed between our clients and you, we will fair our copy on our end, save for the information relating to Deutsche which you will complete on your end and obtain Tan Sri's signature on the aforesaid basis by this evening.
>
> Regards,
>
> Soo Ching

[60] On 2 November 2007 at 20:27, Deutsche's solicitors forwarded a fair copy of the third draft SA to MBf's solicitors:

> Dear Soo Ching,
>
> As instructed by DB, please find attached a clean and mark-up copy.
>
> Thanks,

Pu Wei

[61] Meantime, 2 November 2007 at 20:47, Barry Weisblatt informed Deutsche that 'DB is not in a position to sign yet. We do not intend to raise a full NPA, but there are several issues to be resolved before we can sign. I believe that MBf want to sign tonight. I don't mind if they do so long as they realise that there could still be amendments' (see 1739AR). On 2 November 2007 at 21:00, Deutsche instructed its solicitors that 'DB is not in a position to sign the subscription agreement tonight as we have not obtained all internal approvals necessary for DB to commit to this deal' (1740AR).

[62] MBf contended that by then on 2 November 2007, the parties had a binding contract. The Court of Appeal agreed that the SA came into being on 2 November 2007, and that whatever variations to the SA would be accommodated by a LV. But those findings of binding contract on 2 November 2007 and variations to be accommodated by a LV were not supported by the concatenation of exchanges between the parties after 2 November 2007, which evinced that both parties visibly appreciated that internal credit approval was yet outstanding and that consensus ad idem on the essential terms had yet not been reached on 2 November 2007.

[63] The 2 November 2007 was a Friday. On the next working day, 5 November 2007 at 06:07, Deutsche's solicitors forwarded a draft LV, being proposed amendments to the SA, to Deutsche for comments. On 5 November 2007 at 22:53, Deutsche forwarded the said draft LV to MBf, with the comment 'I have not read this'. The next morning, 6 November 2007 at 07:47, MBf forwarded the said draft LV to its solicitors 'for review and discussion'. On 6 November 2007 at 08:37 MBf responded to Deutsche:

> Have run through it. Largely OK — only point is the pricing at which you come in during tender. It should be 3% plus KLIBOR but DB should tender at highest bid rate at tender or alternatively where no bids are in at a price that we can agree now, which could be at 4.5%.

[64] In the aforesaid email on 6 November 2007 at 08:37, MBf let the cat out that MBf was aware that there was yet no consensus ad idem. The next message from MBf, on 6 November 2007 at 11:46, to its solicitors was even more telling that MBf clearly knew that Deutsche was yet not committed to the SA.

> Proposed change is fine — you may want to convey to Pu Wei. Another matter is the letter, which indicates that we are desirous of the changes proposed, which is not true. The letter should be as if both parties have agreed and that these are the final terms to the Agreement. *We want Deutsche to be committed to the closure of this*. (Emphasis added.)

[65] On 6 November 2007 at 14:30, MBf's solicitors then forwarded the said LV, which proposed substantive amendments to cll 1.2 and 1.3 of the SA, to Deutsche's solicitors (664 – 667AR). Significantly, in the second paragraph of the LV, MBf stated 'following further discussion with Deutsche Bank on 5 November 2007, we hereby agree that the terms of the subscription agreement be amended and revised in the following manner', which was not consistent with the contention that there was consensus ad idem on 2 November 2007. The effect of the finding of the Court of the Appeal was that all essential terms had been reached on 2 November 2007, that the SA was a binding contract, and that the LV was some sort of novation agreement, a side show, so to speak. In other words, it was the finding of the Court of Appeal that the SA alone stood as a binding contract, without the letter of variation. But when we scrutinised the proposed amendments, we found that the proposed amendments were substantive amendments to the manner in which Deutsche could subscribe or procure the subscription of commercial papers, which materially changed the manner in which the subscription of the commercial papers would be effected.

[66] The proposed amendments, in italics, to cl 1.2 of the SA, gave an option, which was not given by the subscription agreement, to MBf to require the subscription to be effected by private placement or direct purchase:

> The Subscriber agrees that, subject to Clause 1.5 below, in relation to each Issue Request made by the Issuer under the CP/MTN Programme, the Subscriber shall subscribe for or procure the subscription of all CPs that the Issuer may wish to issue (subject at all times to the limits imposed by the Subscription Commitment) as at the nominated issue date for the CPs or such later date as the Board of Directors of the Issuer may determine in agreement with the Subscriber (the 'Closing Date') under each such Issue Request at the price defined in Clause 1.3 below. The Subscriber shall subscribe for, and the Issuer shall issue, the CPs in the manner as provided for under Clause 4 of the Notes Issuance Facility Agreement. *Subject to all the other terms and conditions of this Agreement, the Subscriber further agrees that the Issuer may, at its option, request that such subscription by the Subscriber be effected pursuant to a private placement to the Subscriber or direct purchase by the Subscriber from the Facility Agent in the event of issuance of CPs via Tender and the Subscriber shall comply with such request.*

[67] And the proposed amendment, in italics, to cl 1.3 of the SA, read:

> 1.3 The Subscriber shall subscribe for or procure the subscription of the CPs as may be issued by the Issuer at a price ('Subscription Price') corresponding to a yield to be agreed between the Issuer and the Subscriber on or immediately prior to the relevant Issue Request, which yield shall in any event not exceed the aggregate of 3 month KLIBOR (as defined below) (as applicable on the issue date of the CPs issued by the Issuer pursuant to the Issue Request) and 300 basis points per annum (the 'Maximum Yield'):

> For the purposes of the above, '3 months KLIBOR' shall mean the three (3) month rate for deposits (expressed as a percentage per annum) in Ringgit Malaysia which appears on Reuters Screen KLIBOR as at 11am, Kuala Lumpur time on the relevant issue date of the CPs. If such rate does not appear on the Reuters Screen KLIBOR on the relevant issue date of the CPs, the rate applicable on that particular issue date of the CPs shall be the rate appearing on the Reuters Screen KLIBOR as at 11am on the Business Day immediately preceding the relevant issue date of the CPs.
>
> *For the avoidance of doubt, if the CPs are purchased directly from the Facility Agent in the event of issuance of CPs via Tender and the yield for the CPs as may be purchased from the Facility Agent is less than the Maximum Yield, the Issuer shall top up the difference between the yield for the CPs as may be purchased by the Subscriber directly from the Facility Agent and the Maximum Yield by separate cash payment to the Subscriber.*

[68] It would seem that the terms were not settled even on 6 November 2007 at 14:30, for apart from the pricing, '3% plus KLIBOR or at 4.5%', the option to MBf to require the subscription of the commercial papers to be effected by private placement or direct purchase was also not agreed.

[69] While the proposed amendments were still up in the air, Deutsche's solicitors, on 6 November 2007 at 20:27, informed MBf's solicitors that 'we would be required by DB's internal legal to issue our legal opinion in favour of DB advising on the legality, validity and enforceability etc of the subscription agreement and the letter of variation of terms', and requested for further documents from MBf (1808AR). It was then that Deutsche's solicitors, on 6 November 2007 at 21:31, sent the following email, which was another email which was picked out by the Court of Appeal to support its finding on consensus ad idem, to Deutsche:

> Hi Ada
>
> Spoke to Raja Ali, and I was made to understand that that DB Malaysia hopes to sign the proposed subscription agreement and the letter of variation to the terms thereof earliest this Wednesday and latest this Friday.
>
> Thanks and best regards,
>
> Pu Wei

[70] Admittedly, by that internal memo on 6 November 2007 at 21:31, it would appear that Deutsche intended to sign the SA and LV 'earliest this Wednesday and latest this Friday'. But that was an internal memo. Unlike the finding in *Carlyle v Royal Bank of Scotland* [2015] UKSC 13 at paras 12, 13 and 36, there was no assurance by Deutsche that the SA would be signed or commitment by Deutsche to provide financing (see also *Moria & Anor v Bednash* [2011] EWHC 839 (Ch) at paras 33–34). Rather, MBf was earlier informed, on 6 November 2007 at 20:26 (1808AR), that Deutsche still required a legal opinion on the 'legality, validity and enforceability etc of the

subscription agreement and the letter of variation of terms', which could only convey to MBf that Deutsche was yet not committed to the SA and LV, for if the SA had come into being on 2 November 2007, then there could be no place, certainly not on 6 November 2007, for a legal opinion on the 'legality, validity and enforceability etc of the subscription agreement'. That everything was tentative could not have escaped MBf.

[71] But if MBf had understood it to be that the SA came into being on 2 November 2007, the conduct of MBf did not reflect that. For rather than assert that the SA came into being on 2 November 2007, MBf was wholly compliant to Deutsche's requests for further documents. And rather than assert that nothing was outstanding, MBf meekly enquired, on 7 November 2007 at 18:29, 'So I presume no news yet from London. Call me please when you receive something' (1834AR), which pointed to MBf's knowledge that internal credit approval was not in place.

[72] That MBf understood it to be that the SA had not come into being was further divulged by the conduct of MBf after 12 November 2007 (see *R & J Dempster v Motherwell Bridge & Engineering Co* 1964 SC 308, and *Immingham Storage v Clear Plc* [2011] EWCA Civ 89, where the courts took into account the parties' actions after the alleged moment of contract formation; see also *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 at para 56). On 12 November 2007, Deutsche informed MBf that the conditions for approval of the SA could not be met, and that Deutsche, would revert, effectively, to the role of lead arranger and lead manager and not financier (1839 – 1840AR). Deutsche proposed three options to MBf, including the option 'to identify investors to back-stop DB's exposure'. Evidently, quite spontaneously, between 15 November 2007 – 19 November 2007, MBf went along with the option to search for investors (1841 – 1848AR), which conduct was at odds with the contention that the SA came into being on 2 November 2007 but was consistent with the fact that the parties accepted that the SA had not been concluded. It was only much later that MBf contended, on 26 November 2007, that the SA came into being on 2 November 2007.

[73] The entire set of emails/correspondence between the parties consisted of not just the few emails that were picked out by the Court of Appeal. 'It can be dangerous to pick out isolated parts of correspondence to find agreement when the whole evidence is that a formal deed was necessary for a binding contract and all else was preliminary … Parties may have exchanged drafts and have reached consensus but be waiting for a signed agreement before the deal is binding. It is different if the parties do not intend to have a formal document which records their agreement, but rather a formal document which implements an agreement, such as missives to be followed by a formal lease or

conveyance' (*William W McBride, The Law of Contract of Scotland* (3rd Ed) at paras 5–44). Based on the entire set of emails/correspondence, it was so evident that there was no consensus ad idem on the terms, that condition (g) of cl 7, which was always at the forefront of negotiations, was not satisfied, and that the parties so conducted themselves in sure knowledge that condition (g) of cl 7 had not been fulfilled and that there was no binding contract. And based on cl 7 when read in the context of the mandate letter as a whole, the execution of a separate agreement was a pre-requisite for a binding contract.

[74] Even the testimony of MBf's witnesses lent support to those conclusions. Under cross-examination at 483AR, Thomas Matthew ('PW1') agreed that he knew 'that internal approval was always an outstanding matter'. At 483AR, Thomas also agreed that Deutsche was not obliged to provide financing without a separate agreement. Thomas qualified that answer to mean that a separate agreement was not necessary for the ABS. But that qualification of Thomas contradicted his witness statement and the provisions of the SA. In his witness statement, Thomas affirmed that the SA only covered the subscription of commercial papers issued by MBf (912AR), of up to RM600m in nominal value. The SA was only intended to provide bridge financing, 'to provide financing to MBf Cards to repay any CPs that were not taken up or rolled over on maturity' (testimony of Thomas at 905AR), pending the establishment of the ABS. The SA had nothing to do with any asset based securitisation structure secured on the second respondent's receivables. At no time was it ever at any stage of any ABS. When Thomas referred to 'financing' at 483AR, he could only mean 'bridge financing', in line with his testimony at 907AR that pending the establishment of the ABS, 'Deutsche was to provide 'bridge finance to the MBf Cards in form of a line of credit ('the bridge facility') subject to the satisfaction of conditions set out in cl 7 of the mandate letter pertaining to the bridge facility, in particular cll 7(g) and (h) thereof' (907 – 908AR). There could be no question about it. Thomas, who was in the thick of it from the start and was the star witness for MBf, effectively admitted that the SA required prior satisfaction of conditions (g) and (h) of cl 7 of the mandate letter. In fact, there could be no doubt about it, for Thomas also admitted that whatever financing was subject to internal credit approval, at 491AR, 493AR, 513AR, 516AR, 517AR, and 518AR, albeit after some disinclination.

[75] In relation to condition (g), Thomas testified that on 1 November 2007, Raja Ali informed him that internal approval was in place (912AR). Given that there was no finding by the courts below that internal credit approval was or was not in place, it required us, therefore, to make that finding, but of course from the entire set of emails/correspondence. As said, internal credit approval was raised in MBf's email dated 16 October 2007 to Deutsche, wherein MBf enquired 'did your credit committee discuss our proposal yesterday?' There was no evidence that Deutsche had responded to that

enquiry, not even by 2 November 2007, when MBf's request to execute the SA on 2 November 2007 was allowed. Rather, the emails (1739 and 1740AR) showed that Deutsche took the position, which it steadfastly held right up to when MBf allegedly executed the SA on 2 November 2007, that there were issues to be settled and that 'Deutsche was not in a position to sign the subscription agreement tonight as we have not obtained all internal approvals necessary for DB to commit to this deal'. 1739 and 1740AR were internal memos to which MBf were not privy. But nonetheless, it would not appear, not from the email exchanges that MBf was in the dark about the internal credit approval that was not in place on 2 November 2007 and thereafter. On 6 November 2007, Deutsche informed MBf that Deutsch required a legal opinion on the legality, validity and enforceability etc of the SA and LV. In actual fact, MBf was informed that the SA itself was a question mark. As said, it would not seem reasonably conceivable that MBf would just compliantly accept the imposition of a new condition, to wit, a legal opinion on the legality, validity and enforceability etc of the SA and LV, if indeed it were its understanding on 2 November 2007 that the SA came into being on 2 November 2007. But yet contrary to its contention that the SA came into being on 2 November 2007, MBf furnished all further documents that Deutsche requested on 6 November 2007, which was consistent with the defence that the SA had not come into being on 2 November 2007. In point of fact, when asked 'why did (Deutsche by letter dated 7 November 2007) request those documents to be furnished to them?', MBf's solicitor (PW5 — Soo Ching) answered, 'normally those documents are required for completion' (946AR), which answer was incompatible with the contention that the SA came into being on 2 November 2207, for there was no reason for Deutsche, certainly not on 7 November 2007, to ask for further documents or for MBf to furnish them, if the SA had come into being as a binding contract on 2 November 2007. Neither would it add up that MBf would still enquire, on 7 November 2007 at 18:29, 'So I presume no news yet from London. Call me please when you receive something' (1834AR), if MBf had been informed on 1 November 2007 that internal credit approval was in place and or if the SA had come into being as a binding contract on 2 November 2007.

[76] The explanation of Thomas at 602AR was that it was an enquiry 'on the drawdown of the facility'. But that explanation was highly questionable, as the LV had yet to be settled, which would mean that the full terms had yet to be settled and therefore too premature then to enquire on whatever drawdown. Another reason to doubt the explanation of Thomas was that the email exchanges only borne out that his enquiry on 'news from London' could only relate to the decision of Deutsche, whether yes or no, on the SA. On 6 November 2007 at 20:27, Deutsche's solicitors informed MBf's solicitors and Thomas that 'we would be required by DB's internal legal to issue our legal opinion in favour of DB advising on the legality, validity and enforceability etc of the subscription agreement and the letter of variation of terms', and asked for

further documents (1808AR). As said, on 6 November 2007, MBf was put on notice that 'the legality, validity and enforceability etc of the subscription agreement and the letter of variation of terms', which were matters at the heart and soul of internal credit control, were in question, which meant that never was it any one time at any stage of any drawdown of whatever financing. The next morning, 7 November 2007 at 08:39, Thomas replied and agreed to furnish the documents, which he duly furnished on 7 November 2007. In the interim, on 7 November 2007 at 11:06 Deutsche informed its solicitors that 'we have not got all internal approvals to sign these documents. Will let you know when we are ready to sign' (1811AR). In the afternoon, 7 November 2007 at 14:22, Raja Ali enquired from Barry Weisblatt 'on our decision' (1815AR), to which Barry Weisblatt replied 'Nothing yet. We'll do our best' (1829AR). That early evening, on 7 November 2007 at 18:05, Raja Ali informed Thomas that 'my battery has gone flat' (1829AR). Two minutes later, at 18:07, Thomas messaged Raja Ali, 'how do I get in touch with you?' (1831AR). Shortly, on 7 November 2007 at 18:27, Raja Ali replied, 'I will watch my blackberry for messages. I will recharge when I am home. On the way to chiropractor now' (1833AR). Two minutes later, on 7 November 2007 at 18:29, Thomas enquired 'So I presume no news yet from London. Call me please when you receive something' (1834AR). The enquiry of Thomas on 7 November 2007 at 18:29 was made in that context. All parties had been put on notice that Deutsche required a legal opinion on the legality, etc of the SA and LV, and further documents from MBf, which notice was duly acknowledged by MBf on 7 November 2007 when MBf furnished the further documents. On 7 November 2007, MBf should be aware that execution of the SA by Deutsche was wholly dependent on the said legal opinion which was the first hurdle to overcome on 7 November 2007 before there could be any drawdown of whatever financing. Was it therefore probable that Thomas would put the cart before the horse and enquire about drawdown instead of Deutsche's decision on the SA? We do not think so. On 6 November 2007 and 7 November 2007, parties were fully immersed in the legal opinion on the 'legality etc' of the SA. All things considered, it would not seem probable that Thomas would have enquired on drawdown, which had nothing to do with the matter at hand and which had not been raised at all in any of the email exchanges. On the probabilities, it could only seem that Thomas must have enquired on Deutsche's decision on the SA, which 'had escalated to London for consideration' (976AR).

[77] If truth be told, the evidence could not support the claim on a balance of probabilities. Rather, we are of the view that if the mandate letter had been constructed as a whole, that if the entire evidence had been fully considered, and that if the pertinent law had been sufficiently explored, the following findings and or conclusions should pan out.

[78] The LV was not a novation agreement. The LV proposed amendments to the third draft of the SA. If the proposed amendments were mutually accepted, it would only reasonably follow, in line with the conventional practice, to amend the SA accordingly. Perhaps, in the situation where the contracting parties had a binding contract, a novation agreement or other document would have to serve to amend the terms of the contract. But that was not the situation in the present case. Deutsche had not executed the SA. If there were amendments to the SA, the simplest and most sensible thing to do was to amend the SA accordingly. Indeed, in the LV, MBf wrote, 'we hereby agree that the terms of the subscription agreement be amended and revised in the following', which was consistent with revision of the SA. In the scheme of things, it would not seem that the LV was intended to accommodate the amendments. But be that as it may, it was the finding of the Court of Appeal that the variations would be accommodated by the LV. But that finding was wholly against the weight and grain of the evidence. The contemporaneous evidence attested that Deutsche was yet not committed to the SA, be it on 2 November 2007 or at any time thereafter. That was the consistent stand of Deutsche from beginning to end. When MBf made the request on 2 November 2007 at 20:15 to sign the SA on 2 November 2007, Barry Weisblatt immediately made it known, on 2 November 2007 at 20:47, that Deutsche was not in a position to sign (see 1740AR). On 6 November 2007, Deutsche informed MBf of the requirement for the said legal opinion, which should convey to MBf that Deutsche was still not in a position to sign the SA. In addition, there were Deutsche's internal but nonetheless 'real-time' emails to its solicitor and Raja Ali (1811 and 1829AR), which stated that Deutsche had not the approval, not even on 7 November 2007, to sign the SA. All that were the irrefutable proof that Deutsche was yet not commited to the SA. On top of that, there were MBf's two emails on 6 November 2007, wherein MBf effectively admitted that the terms were not settled and that Deutsche was yet not commited to the final terms. It was so incontestably clear that Deutsche was yet not commited to the SA. Given so, the reasonable finding should have been that consensus ad idem on the terms was not reached on 2 November 2007. On that, the trial court was right. But the trial court was in error in its finding that there was no binding contract solely by reason of non-execution. A binding contract could come into being without the formality of an executed agreement. But if the formality of an executed agreement was a pre-requisite for the formation of a binding contract, then no binding contract could come into being without execution of the agreement.

[79] In the instant case, it was not only agreed that a separate agreement must be executed, which was admitted by Thomas, but also that internal credit approval must have been obtained. Thomas testified that on 1 November 2007 Raja Ali informed him that internal credit was in place. But that oral testimony of Thomas was the only bit of evidence that affirmed so but which was not supported by any of the contemporaneous emails or any of MBf's documents,

and was refuted by Raja Ali (976AR). In letter dated 26 November 2007 to Deutsche, MBf listed the 'chronology of events' that allegedly led to a binding contract on 2 November 2007. But internal credit approval in place was not mentioned at all. In fact, Thomas agreed that in 'none of its documents prior to the filing of the writ, was there any suggestion that Raja Ali told (him) on 1 November 2007 that internal credit approval was in place' (542AR) and that 'the only time that (he) made the statement of an alleged representation by Raja Ali of such internal approval was when (he) filed the statement of claim in March 2008, after engaging lawyers' (543AR). The irresistible evidence from the contemporaneous emails, which could not be contrived after the event, was that internal credit approval was never in place. The only opposing evidence was Thomas' oral ipse dixit which had never been raised but was only raised, for the first time in March 2008, well after the event and only when the writ was filed. Fairly said, based on the evidence when properly evaluated, it was no contest. It got to be that internal credit control was never in place and as such, condition (g) was never fulfilled.

[80] Needless to say, without Deutsche's execution of the SA, which even Thomas admitted was required (see 484AR), condition (h) was also not satisfied. Without Deutsche's execution of the SA, no binding contract could come into being. The instant bargain was not a transaction where mere agreement on parties, property and price could bring about a binding contract, as was the case in *Charles Grenier v Lau Wing Hong*, where it was held by the Federal Court per Sri Ram JCA, as he then was, 'that the phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed'. The 'subject to contract' in *Charles Grenier v Lau Wing Hong* belonged to the first or second case stated in *Masters v Cameron*. But the instant 'subject to contract' was the third case stated in *Masters v Cameron*, as the intention of the parties was not to make a concluded bargain at all unless until they execute the SA, quite unlike *Charles Grenier v Lau Wing Hong*, where the 'intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed' was not made out. But the distinction, with respect, was not perceived by the Court of Appeal who, not surprisingly thereafter, felled into error in applying *Charles Grenier v Lau Wing Hong*, which was a land transaction and where the 'subject to contract' was not the third case stated in *Masters v Cameron*. The Court of Appeal also erred in applying *Lee Chin Kok v Jasmin Aurunthuthu Allegakeon & ors*, as the intention of the instant case was not to make a concluded bargain at all unless until they execute the SA. The formality of an executed agreement was by choice. The court should give effect to that intention and not foist an informal contract, which is not the practice of financial institutions (*Royal Bank of Scotland Plc v William Derek Carlyle* [2014] SCLR 167 paras 60–61; see also *Oceanografia SA de CV v DSND Subsea AS The Botnica* at paras 81–82) and is

highly unlikely in complex and intricate bargains (see *Cheverny Consulting Ltd v Whitehead Mann Ltd*), upon Deutsche. The Court of Appeal also got it wrong in applying *OCBC Capital Investment Asia Ltd v Wong Hua Choo*, where it was admitted that there was a binding oral contract (see paras 58–59) and execution of the formal agreement was a mere formality, the facts of which were so very different from the instant case. But even if consensus ad idem on the terms had been reached, it remained that conditions (g) and (h) were not fulfilled. Even if condition (g) had been fulfilled, there was no executed agreement to bring about a binding contract. In short, the claim could not succeed. The result must be put right. Before we get to that, we need to answer the leave questions, but only 1.1 – 1.5, as follows:

[81] Unless required by law, the formality of an executed agreement is an exception rather than the rule. Where there is no executed agreement, the court will be required to find whether negotiations and exchanges had crystallised into a concluded, albeit informal, contract. Each case must turn on its own facts. 'The established rule is that in interpreting a contract, it is permissible to look at the factual matrix, but the evidence of negotiations and statements of subjective intention must be disregarded … But it is inapplicable when the issue is, instead, one of contract formation. It is likewise inapplicable when rectification is claimed: evidence of negotiations and all other surrounding circumstances will be received' (*Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* per Richardson P, Keith, Blanchard and McGrath JJ). In the case of a complex bargain, it will be more challenging to find the consensus ad idem on the terms. 'The general principle in English law is that all contracts are governed by the same principles; and that the rules for the formation, contents and remedies apply equally to all contracts' (*Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer* by John Cartwright at p 53). Unless required by law, there is no rule that a complex and intricate bargain cannot be concluded by an informal contract. To ensure that no premature binding contract is concluded through negotiations and exchanges, whether written or oral, it should be made amply clear that all negotiations and exchanges are subject to contract, and that parties are not bound until execution and exchange of a formal contract, as in the third case stated in *Masters v Cameron*. There is, arguably, a fourth case of 'subject to contract, similar to the first and second cases, arising where the parties to be bound immediately with the expectation to include additional terms to be negotiated upon in a further contract in substitution of the first contract (see *Sinclair Scott & Co Ltd v Naughton* (1929) 43 CLR 310 at p 317, *John R Keith Ltd v Multiplex Constructions (NSW) Pty Ltd* [2002] NSWSC 43 at pp 218–237, and *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd* (1986) 40 NSWLR 622; see also *Michael Furmston & GJ Tolhurst 'Contract Formation: Law and Practice'* at paras 9.20, 9.61–9.63). There is no special form of words to be used in order that there shall be no binding contract before execution of the agreement, so long as the formality by choice of an executed

agreement to bring about a binding contract is disclosed by the language employed as a whole.

[82] There was no concluded contract in the instant case. One reason was the absence of an executed agreement, which was an agreed element for the formation of a binding contract. Both must sign the SA (see *Cheverny Consulting Ltd v Whitehead Mann Ltd* at paras 45–46). Pursuant to the mandate letter, 'It was open to either party, at any time before the entry into such a formal contract, to withdraw from the negotiations ... ' (*Taylor v Burton & Anor* [2015] EWCA Civ 142 per Sir Colin Rimer (Ryder LJ agreeing). By that, the mandate letter had provided for the application of *locus poenitentiae*.

[83] In view of what is about to be pronounced, we need not answer leave questions 1.7–1.9.

[84] For reasons given aforesaid, we, the remaining judges of the court (see s 78 of the Courts of Judicature Act 1964) following the resignation of Mohamed Apandi Ali FCJ as he then was, now AG, unanimously allow this appeal with costs, here and below, to the appellant. Accordingly, we set aside all orders of the Court of Appeal and restore the orders of the trial court, in particular, the order of dismissal of the entire claim.

Appeal allowed with costs.

Reported by Kohila Nesan